In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,
Petitioner,

vs.

KQED, INC., et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Thomas L. Houchins, Sheriff of the County of Alameda, State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case. The majority and concurring opinions of the Court of Appeals in this case are reported in 546 F.2d 284 (9th Cir. 1976); those opinions are reproduced in the Appendix to this Petition, Appx. pp. 1-26. The Court of Appeals affirmed an unreported decision of the United States District

Court for the Northern District of California, granting a preliminary injunction. The District Court's preliminary injunction and that court's accompanying memorandum and order are also reproduced in the Appendix, Appx. pp. 27-33.

JURISDICTION

The judgment of the Court of Appeals was dated and filed November 1, 1976. On November 15, 1976, Petitioner Sheriff Houchins ("Sheriff") filed his Petition for Rehearing (and suggestion that rehearing be in banc). On December 22, 1976, the Court of Appeals denied the Petition for Rehearing. (The order denying that petition is reprinted at Appx. p. 34.) The Court of Appeals also denied a motion for stay of mandate pending application for a writ of certiorari. There has been no application for, or order granting or denying, an extension of time within which the Sheriff may file this Petition for Writ of Certiorari. The Sheriff applied to this Court for a stay pending review on certiorari, and on January 28, 1977, Mr. Justice Rehnquist granted the stay. Mr. Justice Rehnquist's opinion with respect to that application and stay is reprinted in Appx. pp. 35-40.[1]

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

The question presented for review is, did the District Court err in granting a preliminary injunction requiring the Sheriff to grant to Respondent KQED, Inc. ("KQED") greater access to the Sheriff's county jail facility than the Sheriff grants to members of the public at large?

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1. In granting the stay, Mr. Justice Rehnquist stated ". . . that departure from unequivocal language in one of our opinions which on its face appears to govern the question ought to be undertaken in the first instance by this Court, rather than by the Court of Appeals or by the District Court." Appx. pp. 38-39.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, reading in relevant part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

as made applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

This case involves the access of the media to the inmates and premises of a county jail. As will be seen in detail hereafter, members of the general public may tour the Alameda County jail facilities at Santa Rita on one of the semi-monthly scheduled tours, and may communicate with the inmates in various other ways. However, the members of the public may not photograph the institution or inmates, and may not interview inmates, in the course of any tour. As will be further seen, media representatives have greater access to the facility and the inmates than do members of the public, but media representatives, like members of the public, may not photograph the institution or inmates, and may not interview inmates, in the course of the tour.

The complaint was filed in the District Court on June 17, 1975. Plaintiffs invoked the court's jurisdiction pursuant to 28 U.S.C. § 1343(3), stating that the suit was authorized by 42 U.S.C. § 1983. The plaintiffs in the District Court were KQED, Inc. and the Alameda and Oakland branches of the NAACP. KQED, Inc. is a non-profit corporation engaged in educational television and radio broadcasting. The NAACP plaintiffs are unincorporated associations (and the local branches of the national NAACP), whose members reside in Alameda and Oakland in Alameda County, California. Defendant Houchins was and is the Sheriff of Alameda County. He has been employed by Alameda County Sheriff's Department for thirty years, including five as commanding officer at Santa Rita. He was the Assist-

ant Sheriff (or Undersheriff) for five years, and was elected Sheriff effective January 1, 1975. As Sheriff he has general supervision and control of all Alameda County jail facilities, including those located at Santa Rita.

In its complaint KQED alleged that it had asked the Sheriff for permission to inspect the maximum security portion of Santa Rita, a building commonly referred to as Greystone. (Santa Rita also has medium and minimum security facilities, called Little Greystone and the Compound, respectively.) The Sheriff had refused the request. KQED, simultaneously with filing the complaint, moved for the issuance of a preliminary injunction enjoining the Sheriff, during the pendency of the action, from excluding KQED from the premises. The Sheriff filed an opposition to the motion, and an answer. In the answer, the Sheriff alleged (in reply to the request for admission to the facility) that if KQED were permitted to enter, then all other media representatives would have to be given similar privileges; that such spasmodic tours would be unduly disruptive to the operations of the facility; and that KQED, other media representatives, and the general public could view the facilities on the then-planned public tours.

Further memoranda and affidavits were submitted to the District Court. An evidentiary hearing was held on November 6 and November 10, 1975. On November 20, 1975, the District Court issued its preliminary injunction, together with its memorandum and order explaining the same. The District Court determined (1) that press [media] access must be allowed greater than that afforded the general public; that is, the press must not be prevented from providing "full and accurate coverage of conditions", and may not be denied access to any of the facilities at reasonable times and hours; (2) that such access must at least include the use of cameras and sound equipment,

and inmate interviews; and (3) that access may be restricted only in the event of jail tensions or other dangerous circumstances. Appx. pp. 27-28.

On December 4, 1975, the Sheriff appealed to the Court of Appeals for the Ninth Circuit. On the same day the Sheriff sought and was denied a stay of the preliminary injunction in the United States District Court pending determination of the matter on appeal. The Sheriff then applied on the same day for a stay in the Court of Appeals. The Court of Appeals, per Chambers and Snead, Circuit Judges, granted the stay, saying

> Upon due consideration, the petition for stay of injunction pending appeal is granted. The injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay.

A different panel of the Court of Appeals heard and decided the case, and the opinion of that court was filed on November 1, 1976. The subsequent history of the case has previously been related.

KQED did not allege, and the District Court did not find, that the access to the inmates and facilities afforded the members of the public at large was in any way inadequate. However, in view of the legal issue presented, it remains necessary to discuss the access afforded the members of the public.

A. Mail

The rules for inmate conduct were introduced in evidence, and include rules with respect to mail. For inmates in the maximum security area, for example, the rules may be summarized as follows: there is no limitation on the number of letters an

inmate may send or receive; there is no limitation on the persons to or from whom letters may be sent or received. Letters to and from members of the public (including media representatives) would be inspected for contraband, but would not be read. Inmates without funds for pens, paper, and stamps would receive the same free of charge.

B. Visiting

Sentenced inmates may be visited from 11:30 a.m. to 2:30 p.m. on Sundays. There is no age limitation on visitors, except that a visitor under eighteen years of age must be accompanied by an adult. There are no lists of approved visitors.[2] Except for restrictions with respect to those visitors who have been previously confined in penal institutions, there are no limitations with respect to the identity of the visitor. Unless a media representative fell within these two limitations, any reporter could visit any inmate.

Pre-trial detainees may be visited on Sundays from 11:30 a.m. to 3:30 p.m., and on Tuesdays, Wednesdays and Thursdays from 6:00 p.m. to 8:00 p.m. In other respects the pre-trial detainees are subject to the same restrictions as are sentenced inmates, except, of course, that counsel may visit at any reasonable time.

Apart from visitation, pre-trial detainess may be interviewed by a media representative (but not by a member of the general public), if the written consents of the detainee, his attorney, and the court having jurisdiction have first been obtained. These interviews could be photographed or recorded. Similarly apart from visitation, sentenced inmates may be interviewed upon their

2. This reflects an even more expansive policy than was approved in *Pell v. Procunier,* 417 U.S. 817, 824-825 (1974), where the Court found that the visitation policy in San Quentin, permitting only limited visits from members of the inmates' families, the clergy, their attorneys, and friends of prior acquaintance, did not seal the inmate off from personal contact with those outside the prison.

release from the facility.[3] The Sheriff has offered to inform the media representatives upon request of the time of departure from Santa Rita and expected arrival in Oakland of the release bus containing inmates being released. Interviews of released inmates could, it is submitted, be conducted in an atmosphere free from any real or imagined pressures, either from other inmates, on the one hand, or from the Sheriff's staff, on the other. No media representative has ever asked the Sheriff for this information, or taken advantage of this offer.

C. Telephone

Inmates in the maximum security facility may make unmonitored, collect telephone calls without restriction. The nature of telephone access by inmates housed elsewhere is not disclosed in the record.

D. Public Tours

Since shortly after assuming office in January, 1975, the Sheriff planned public tours of Santa Rita. Indeed, at the time the complaint was filed KQED knew that the tours would commence. The first tour was held on July 14, 1975. At first the tours took place monthly, and waiting lists built up. Beginning in January, 1976, the tours have been held semi-monthly. The tours have also been expanded in size so that thirty persons may go on each tour. That situation still obtains. Since January, 1976, there has been essentially no waiting list for the tours.

The tours cover virtually all of the facilities at Santa Rita. The District Court heard testimony illustrating in detail the route

3. The facility is, of course, a county jail. Statistics in evidence indicate that sentenced inmates are incarcerated, on the average, for thirty-two days, and that pre-trial detainees are incarcerated, on the average, for ten days. The nature of the inmate population has changed radically over recent years, in that the inmates are more difficult to handle.

of the tour, and the interiors and exteriors of the buildings visited, including descriptions and photographs of the foregoing. Plans of the facility were admitted in evidence to illustrate the course of the tour, and photographs were also admitted in evidence. (Those photographs are also offered for sale at a reasonable price to those taking the tour.) Almost all portions of the maximum security facility, Greystone, are covered on the tour: its cells, day-rooms, exercise yard, kitchen, and dining halls.[4]

The tour was criticized for being scheduled, rather than on demand; for not permitting the interviewing of inmates and the photographing of inmates and the facilities during the tour; for not including the pre-trial detainee barracks commonly known as Little Greystone on the tour (although the interior of that building is identical to that of the other barracks, which are included); and for not having inmates on view. These criticisms were, of course, from the point of view of a media representative, as such, and not from the point of view of a member of the public. There was no evidence or argument that the tours were inadequate in any way with respect to the public. No testimony whatever was presented by the NAACP plaintiffs or their members.

Testimony was presented on behalf of the Sheriff explaining why it was difficult to accede to KQED's request that tours be available to the press on demand, and that such tours permit interviewing of inmates and photographing of inmates and the facilities. First, such a program would be extremely disruptive.

4. Greystone is the facility involved in *Brenneman v. Madigan*, 343 F.Supp. 128 (N.D.Cal. 1972). After that decision was filed, extensive renovations and additions were made to Greystone, and as a result of those improvements (together with the County's assurances that it intended to proceed with the construction of new jail facilities) the *Brenneman* case was dismissed. The *Brenneman* case is referred to in footnote 1 in the opinion of the Court of Appeals in this case, Appx., p. 2. In view of the comprehensive tour of the Greystone facility, the remark of the Court of Appeals in footnote 2 of its opinion, Appx., p. 3, is inexplicable.

The facility runs on a tight schedule, involving very frequent moving of inmates. Those movements include to and from classes, meals, and work, as well as movements to operate the facility and to transport pre-trial detainees to and from the courts. (Most of the courts are located a considerable distance away from Santa Rita.)

Moreover, during the tour the inmates must be locked in their cells or otherwise removed from contact with the visitors. No interviewing or photographing of pre-trial detainees could be accomplished without their consent and the consent of their attorneys and the courts; the difficulties involved in this aspect of the matter are compounded because one cannot identify a pre-trial detainee merely by looking at him or by determining where he is housed.

There are, in addition, security devices throughout the institution which may not be photographed.

The result of all of these concerns of the Sheriff is that close supervision is requered by the Sheriff's personnel of anyone taking photographs or interviewing inmates. Equipment brought on the premises must be searched. Thus the Sheriff concluded that visits could not be conducted on demand, or indeed on any basis other than a scheduled one. Scheduled tours exclusively for the media, however, permitting the use of cameras, but without interviews, could be accommodated.

The media representatives may go on the public tours. In addition to those tours, there is now, and has been, media access (with cameras) for special events, such as fires or escapes. KQED has participated in these special media openings. (Compare the remark of the Court of Appeals, Appx. p. 4: "Media access, on reasonable notice, may be desirable in the wake of a newsworthy event, ..." That access exists.)

The District Court in its memorandum accompanying its preliminary injunction did not criticize in any way the access granted the public, as such, to the inmates or to the Sheriff's facilities; indeed, the subject was apparently not even considered relevant.[5] Instead, the entire burden of the District Court's remarks was directed to a critique of the Sheriff's fears with respect to media entry, and a comparison of his actions with the press policies of the San Francisco Sheriff and of the state authorities at San Quentin.[6] The District Court adjudged the Sheriff to have an inadequate *media* policy, and therefore enjoined him to develop an adequate media policy within the limits set forth in its memorandum and its preliminary injunction. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals is in Conflict with Decisions of the Supreme Court.

A. THE PUBLIC'S RIGHT OF ACCESS TO THE JAIL MEETS CONSTITUTIONAL REQUIREMENTS.

But for the statement of District Judge Pregerson quoted in footnote 5, *supra,* that the District Court had determined the public access to be constitutionally inadequate, the above-cap-

5. Thus District Judge Pregerson, writing for the Court of Appeals, is patently incorrect when he asserts, Appx., p. 3● that

> Implicit in the trial court's memorandum granting the preliminary injunctions (sic) is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy.

On the contrary, there is no evidence that the District Court ever considered what the rights of the public were. KQED did not argue in its Motion for Preliminary Injunction that the public's rights were violated, and despite the fact that the Sheriff urged, in his Opposition, that the extent of the public's right of access was the central legal question, neither the District Court's memorandum nor its preliminary injunction addresses the point.

6. The District Court did not deal with the *public* access to San Quentin, which was much more limited than the public access to Santa Rita. See discussion pp. 11-12 below.

tioned proposition need not be argued. That proposition was not challenged in the proceedings before the District Court.

The Supreme Court has said that it is a "truism that prisons are institutions where public access is generally limited." *Saxbe v. Washington Post Co.,* 417 U.S. 843, 849 (1974). The parameters of that access set by professional correctional officials are usually accepted by the courts, just as are other similar professional judgments by those officials. *Pell v. Procunier,* 417 U.S. 817, 826-827 (1974). See also *Adderley v. Florida,* 385 U.S. 39 (1966). The facts concerning the public's access to the Sheriff's jail have been previously discussed.

In *Pell v. Procunier, supra,* the Court discussed the available means of communication between the public and the inmates and premises of the state prison at San Quentin. As in *Pell,* the Sheriff here permits virtually unimpeded communication by mail. See 417 U.S. at 824. But in San Quentin, personal visitation was limited to members of the family, the clergy, the attorneys of the inmates, and friends of prior acquaintance. 417 U.S. at 824-825. The Sheriff's policy is much more liberal—there is no restriction on who may visit, other than as indicated previously. Turning to public tours: as of May 1975,[7] San Quentin conducted 24 dinner tours for the public each year, intended primarily for organized groups such as churches and bar associations. There was approximately a one-year waiting period for these dinner tours. There was no other public access to the facilities. The San Quentin rules made it clear that there were to be no cameras and no contact with or interviewing of inmates permitted. (Indeed, the inmates were moved out of the areas to be visited before the visitors arrived.) The Sheriff's tours grant greater public access to his facility than do the San Quentin tours. It is therefore submitted that the Court's summation in *Pell* of the San Quentin situation, "the record demonstrates that, under current corrections policy,

7. *Pell* was decided in 1974.

both the press and the general public are accorded full opportunities to observe prison conditions", 417 U.S. at 830, applies to the Sheriff's facilities at Santa Rita.

But District Judge Pregerson, writing for the Court of Appeals, seems to find that the Sheriff is unconstitutionally limiting the public's access to his facility:

> Implicit in the trial court's memorandum granting the preliminary injunctions is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy. (Appx. p. 3.)

If left to stand, this statement by the Court of Appeals that the program of public access to a prison or jail as described in that opinion is constitutionally inadequate will have national consequences: this will be the first reported decision of any court that a comprehensive program of public tours of a jail is insufficient as a matter of law. Even KQED had urged that this was not the occasion to make a determination of the public's rights. This assertion of the Court of Appeals requires the assumption that despite express language to the contrary, the District Court's preliminary injunction was both intended to apply, and in fact applies, to a member of the public as well as to the media. It is submitted that the District Court had no such intention or belief, and further that there is nothing in the record which would support such a determination even if the District Court did so intend. Finally, such a finding is in direct conflict with the determination of the Supreme Court in *Pell*.

B. THE MEDIA'S RIGHT OF ACCESS TO THE JAIL MEETS CONSTITUTIONAL REQUIREMENTS.

The preliminary injunction forbids the Sheriff to deny access to any of the facilities at reasonable times and hours; states that such access must at least include the use of cameras and sound equipment, and inmate interviews; and implies that such access

may be restricted only in the event of jail tensions or other dangerous circumstances. Appx., p. 28. That kind of access is not provided the general public, and it is submitted that therefore such access is not constitutionally required.

> [N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. [¶] . . . The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

See also *Saxbe v. Washington Post Co.*, 417 U.S. 843, at 850 (1974).[8]

As Circuit Judge Duniway notes in his concurring opinion for the Court of Appeals, "It [is] clear beyond the possibility of argument that the preliminary injunction from which the appeal is taken grants to KQED and other media greater access to the Santa Rita jail than is granted to the public. [¶] I cannot reconcile this result with the decisions in [*Pell* and *Saxbe*]." Appx. p. 21. But despite the unequivocal holdings of *Pell* and *Saxbe*, the three-member panel of the Court of Appeals affirmed the District Court's order and preliminary injunction without modification.

District Judge Pregerson attempts to make the dubious distinction that the co-extensive rights of access by the media and the public, required to be recognized by *Pell*, do not require identical

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8. See also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), where the court said, "The right to speak and publish does not carry with it the unrestrained right to gather information"; *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972), "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally . . ."; *Mazzetti v. United States*, 518 F.2d 781, 783 (10th Cir. 1975), where the suggestion that the status of a newsman should carry a special First Amendment impact was soundly refuted by the court.

implementation. Appx. pp. 3-4.[9] Circuit Judge Hufstedler makes the same point. After reaching the conclusion that "news media, as surrogates for the public, cannot claim any constitutional entitlement to acquire information from which the general public is appropriately excluded," Appx. p. 24, she then converts the "public" into a "tour group", and finds that news media representatives ought to have greater access than does a tour group. Appx. pp. 25-26. These conclusions by the two judges, that the media is entitled to greater access than is the public, are in direct conflict with this Court's holdings.

Moreover, the decision of the Court of Appeals also departs from the Ninth Circuit's previous resolution of the problem. In an action by a newspaper guild seeking to enjoin prison officials from denying the news media the right to interview prisoners, a different three-member panel of the Court of Appeals held that the ban on interviews did not unduly restrict the flow of information to the public. *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973). The Guild had contended, based on *Branzburg v. Hayes*, 418 U.S. 665, 681 (1972), that there was an absolute right to gather news. In response to this contention, the Court of Appeals, quoting from *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), stated: ". . . The right to speak and publish does not carry with it the unrestrained right to gather information." 480 F.2d at 1067.

Other circuit courts, in deciding cases involving prison access by the press, have applied the rule of *Pell* and *Saxbe* without the difficulties encountered by the Court of Appeals in this case. For

9. District Judge Pregerson states: ". . . the court did not err by issuing an injunction that, on its face, grants greater prison access to the news media than the access accorded the public on monthly guided tours of the facility . . . The access needs of news media and the public differ." Appx., p. 4.

example, the Court of Appeals for the First Circuit set aside its own judgment after considering the impact of *Pell* and *Saxbe*. In that case an author, under contract to write a biography of James Earl Ray, sought access to Ray's brother, a federal prisoner, for an interview. The court was of the opinion when it decided the case initially that "If any access is ever to be permitted, the hard core of allowed access would include . . . this case . . .", *McMillan v. Carlson*, 493 F.2d 1217 (1st Cir., 1974). But in light of *Pell* and *Saxbe*, not even this access could be compelled, and the court properly set aside its order in order to comply with this Court's decisions.[10]

II. The Decision of the Court of Appeals Raises Important Questions Concerning (A) the Administration of Correctional Facilities Throughout the Country, and (B) the Extent of the Media's First Amendment Right to Gather News.

The erroneous decision of the Court of Appeals has national consequences in at least two respects.

In the first place, the characterization of the Sheriff's public and media access program as unconstitutionally narrow will require every other administrator of correctional facilities to do more. Since the Sheriff's public access program is greater than was approved in *Pell*, as has previously been demonstrated, the result is to impose a burden on these administrators which they are not lawfully required to bear.

Moreover, the Court of Appeals has become more involved in prison administration than the guidelines of this Court would permit. Both prisons and jails must house large numbers of

10. See also *Main Road v. Aytch*, 522 F.2d 1080, 1090 (3rd Cir. 1975), wherein the Third Circuit instructed the District Court, on remand, to direct that *if* the prison superintendent "intends to continue to grant some but not all prisoner requests for interviews and press conferences," he should develop appropriate regulations concerning the granting of permission. Implicit in this decision is the conclusion that a total ban on individual interviews and press conferences is constitutional.

people and, at the same time, maintain internal order and discipline. Internal security within the correctional facilities is central to all other correctional goals. *Pell,* at page 823. Without such security, the other aims of the correctional system will necessarily cease. In view of the numerous alternative means for members of the media to communicate with jail inmates and to become informed of conditions within the jail, the elevation to a constitutional level of the right of access here demanded is without justification. As stated in *Pell,* "So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, 'prison officials must be accorded latitude.' *Cruz v. Beto,* 405 U.S., at 321." *Pell,* at page 826.

Secondly, the Court of Appeals has simply not followed the decisions of this Court in *Pell* and *Saxbe.* One of the Circuit Judges conceded that the effect of the decision of the Court of Appeals is to give the press greater rights than are required to be given the public. As Mr. Justice Rehnquist put it in granting the stay, this is "a result seemingly inconsistent with our holding in *Pell* that the press is not entitled to greater access." Appx., p. 37. The ramifications of this erroneous conclusion are not confined to the correctional system, but rather extend to all aspects of American public life where citizens and the media seek information.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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(Appendix follows)

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*We acknowledge the assistance of law student Diana M. Allen in the preparation of this petition.

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 75-3643

KQED, Inc., Alameda Branch and
Oakland Branch, National Association
for the Advancement of Colored People,
Plaintiffs-Appellees,

vs.

Thomas L. Houchins, individually
and in his official capacity as Sheriff
of Alameda County,
Defendant-Appellant.

OPINION

[November 1, 1976]

On Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and HUFSTEDLER, Circuit Judges,
and PREGERSON,* District Judge.

PREGERSON, District Judge:

This is an appeal from the trial court's issuance of a preliminary injunction restraining appellant, the Sheriff of Alameda County, California, from depriving appellees of their First and Fourteenth Amendment rights by "excluding as a matter of general policy . . . responsible representatives of the news media

*The Honorable Harry Pregerson, United States District Court Judge for the Central District of California, sitting by designation.

from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof. . . .[1] To allow "full and accurate coverage" of jail conditions, the preliminary injunction requires that the reporters be given access to Santa Rita "at reasonable times and hours," and that they be allowed to use photographic and sound equipment and to interview inmates. The specific method of implementing media access was left to the Sheriff's determination, and the Sheriff was given discretion to exclude the media when jail tensions made such access dangerous. The question presented on appeal is whether the terms of this preliminary injunction, entered after a full evidentiary hearing, constitute an abuse of the trial court's discretion.

Clearly, the First Amendment grants the news media a constitutionally protected right to gather news. *See Branzburg v. Hayes,* 408 U.S. 665, 681-707 (1972), *Pell v. Procunier,* 417 U.S. 817, 833 (1974). This right is indispensable in preserving the news media as a major source of information for the public, particularly when the information sought concerns governmental institutions, including prisons. *See Mills v. Alabama,* 384 U.S. 214, 219 (1966). The conditions of our nation's prisons "are a matter that is both newsworthy and of great public importance." *Pell v. Procunier,* 417 U.S. at 830 n.7.

The parties, however, dispute whether the scope of this newsgathering right encompasses the kind of access to Santa Rita Jail granted the news media by the preliminary injunction. Appellant relies on the Supreme Court's observation that "newsmen have no constitutional right of access to prisons or their

1. *Brenneman v. Madigan,* 343 F. Supp. 128, 133 (N.D. Cal. 1972) described conditions at the Greystone building at the Santa Rita facility as "truly deplorable." The district judge held that the "shocking and debasing conditions which prevailed there constituted cruel and unusual punishment for man or beast as a matter of law." [1]

inmates beyond that afforded the general public."[2] *Pell v. Procunier,* 417 U.S. at 834. On the basis of this statement, appellant argues that this preliminary injunction is an abuse of discretion because it permits reporters to view Santa Rita Jail and communicate with its inmates in ways denied the public during scheduled monthly tours of the facility.

The above-quoted language from *Pell v. Procunier* simply states that the news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right. Implicit in the trial court's memorandum granting the preliminary injunctions is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy. Although the memorandum does not explicitly mention the public's rights, the trial court applied the proper test to determine whether these rights were infringed: a governmental restriction on First Amendment rights can be upheld only if the restriction furthers an important or substantial governmental interest unrelated to suppressing speech and the restriction is the least drastic means of furthering that governmental interest. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968). The preliminary injunction, while protecting First Amendment rights, also satisfies the governmental interests in security of the jail and privacy of inmates. The Sheriff can exclude media access when jail security is threatened, make reasonable time, place, and manner restrictions, and develop appropriate administrative

2. The Supreme Court found that the regulation limiting press access in *Pell v. Procunier* was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions." 417 U.S. at 830. The Court observed: "Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions." *Id.* In contrast, the Santa Rita Jail was completely closed to both the news media and the public prior to the filing of the present suit. After suit was filed, appellant inaugurated a program of monthly public tours of Santa Rita. Appellees presented evidence that these tours were limited to 25 people, booked months in advance, prohibited use of cameras or sound equipment, prohibited conversations with inmates, and omitted views of many parts of the jail, including the notorious Greystone Building. [2]

regulations that require searches of reporters, identification of press representatives, and consent from inmates for interviews and photographs.

Having determined that appellant's restrictive policy was an infringement of constitutional rights, the court did not err by issuing an injunction that, on its face, grants greater prison access to the news media than the access accorded the public on monthly guided tours of the facility. *Pell v. Procunier* does not stand for the proposition that the correlative constitutional rights of the public and the news media to visit a prison must be implemented identically. The access needs of the news media and the public differ. Media access, on reasonable notice, may be desirable in the wake of a newsworthy event, while the interest of the public in observing jail conditions may be satisfied by formal, scheduled tours. Moreover, the administrative problems inherent in public and media access differ. A large public tour [3] group creates a greater security threat and requires the use of more jail personnel to supervise the tour, while a single reporter, known to jail officials, should cause minimal, if any, interference to jail routine. Although both groups have an equal constitutional right of access to jails, because of differing needs and administrative problems, common sense mandates that the implementation of those correlative rights not be identical.

In the circumstances of this case, we cannot say that the trial court's issuance of the preliminary injunction was an abuse of discretion. Its order granting the preliminary injunction is therefore affirmed.

To determine the questions of infringement of the correlative rights of the public and the media and the means by which these rights are to be implemented, the trial court should consider the kind of access accorded the news media and the public in the California state prison system, as discussed in *Pell v. Procunier,* and the access accorded by the federal prison system as set forth in Policy Statement No. 1220.1B, a copy of which is attached as Appendix A. [4]

Appendix A

FEDERAL PRISON SYSTEM — WASHINGTON, D. C. 20534

POLICY STATEMENT — NUMBER 1220.1B

SUBJECT: CONTACTS WITH NEWS MEDIA — DATE 7/1/76

1. PURPOSE. To establish, for a trial period of July 1 - December 31, 1976, the policy of the Bureau of Prisons with respect to the news media.

2. POLICY. The Bureau of Prisons recognizes the desirability of establishing a policy that affords the public greater access to news about its operations. The policy is not designed to provide publicity for inmates or special privileges for the news media, but rather to insure a better informed public. The correspondence and interviews, in a prison setting, must be regulated to insure the orderly and safe operation of the institution.

3. DIRECTIVE AFFECTED. Policy Statements 1220.1A and 1220.6/7300.96 are superseded by this Policy Statement.

4. PROCEDURE.

a. *Application*

(1) For the purposes of this policy statement representatives of news media shall be defined as the following: Persons who are primarily employed in the business of gathering or reporting news for (a) a newspaper qualifying as a general circulation newspaper in the community to which it publishes, (b) news magazines having a national circulation being sold by newsstands to the general public and by mail circulation, (c) national or international news services, (d) radio and television news

programs of stations holding Federal Communication Commission Licenses.

Persons currently confined as prison inmates may not be employed or used as reporters under this policy statement. [5]

A newspaper is one of "general circulation" if it circulates among the general public and if it publishes news of a general character and of general interest. A key test to determine whether a newspaper qualifies as a "general

circulation" newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or the area to which it distributes. It is generally held that for a newspaper to be considered in law a newspaper of general circulation, and so be qualified to publish legal notices, it must contain items of general interest to the public such as news of political, religious, commercial, or social affairs.

(2) Interviews by reporters and others not included in 4a(1), may be permitted only by special arrangement and with approval of the Warden.

(3) These regulations apply to all inmates in Federal institutions. When an inmate is confined in any non-Federal facility the local or state facility rules and regulations will govern.

b. *Institution Visits.*

(1) Representatives of the news and other media are encouraged to visit Bureau institutions for the purpose of preparing reports about institutional facilities, programs and activities. Media representatives shall make advance appointments for visits. During an institutional

emergency, and for a reasonable time thereafter, the Warden may suspend all such media visits.

(2) When media representatives visit institutions, photographs of programs and activities may be taken, and media representatives may meet with groups of inmates engaged in authorized programs and activities. Inmates have the right not to be photographed, (still, movie or video), and not to have their voices recorded by the [6] media. Visiting representatives shall be required to obtain permission before photographing or recording the voices of inmates participating in authorized programs and activities and shall be advised that use of names, identifiable photos of inmates, and voice recordings are not encouraged, but if taken or made releases must be signed by the inmates and placed in their respective files.

(3) The Bureau of Prisons has no objection to visits by news media representatives to schools or business establishments which employ offenders in community programs for the purpose of viewing offenders in community programs. It is the responsibility of the media representatives

to obtain permission of the school or employer in advance. The rules outlined in paragraph (2) above apply to the community situation.

c. *Correspondence.*

(1) An inmate may write to representatives, specified by name or title, of the news media or other publications. Correspondence to a newsman may be sent through the Prisoners Mail Box, which provides for unopened correspondence. All properly identified and labeled correspondence to qualifying representatives of the news media shall be forwarded directly, promptly, sealed and without in-

spection. If there is doubt as to whether a representative qualifies, the institution should contact the Bureau's public information officer in the Central Office.

(2) Representatives of the news media or other publications may initiate correspondence with a particular inmate. Incoming correspondence from the news media or other publications will be inspected for contraband, and for content which is likely to promote illegal activity, or conduct contrary to Bureau regulations. A rejected letter will be returned to the author, with a brief explanation for the rejection. The author will also be notified that he or she may protest the rejection, and the complaint [7] will be referred to an official other than the individual who originally disapproved the correspondence for review.

(3) The inmate may not receive any compensation, nor anything of value, for correspondence or interviews with the news media as defined in paragraph 4a(1).

(4) A transmittal letter, similar to the attached sample, will be attached to the outgoing Prisoners Mail Box letter, and the properly labeled mail will be sent each working day, at government expense.

d. *Personal Interviews.*

(1) Either an inmate or a representative of the news media may initiate a request for a personal interview at an institution. *As a prerequisite to the interview, the inmate must authorize the institution staff to respond to comments made in the interview and to release information to the news media relative to the inmate's comments.*

[Page 4 1220.1B 7/1/76]

(2) If the news media representative wishes to conduct a personal interview at the institution, and makes a written request directed to the Chief Executive Officer of the institution for authorization, it will be permitted subject to the conditions of this policy statement.

(3) Representatives of the news media may request to interview a particular inmate. The request shall be made in writing to the Warden of the institution within a reasonable period of time—normally within 24 to 48 hours—prior to the requested time for the interview.

(4) The inmate will be notified by the institution of the interview request and must agree to be interviewed by signing a consent form (attachment 3) before the request will be considered. The written consent or denial shall, in all cases, be placed in the inmate's central file.

(5) A request will normally be approved or disapproved within 24 to 48 hours. An interview may be disapproved for any of the following reasons, provided that the Warden documents any such disapproval: [8]

(a) The news media representative, or the news organization which he or she represents, does not agree to the conditions established by this policy or has, in the past, failed to abide by the required conditions.

(b) The inmate is physically or mentally unable to participate. This shall be supported by a medical officer's statement (a psychologist may be used to verify mental incapacity) to be placed in the inmate's record, substantiating the reason for disapproval.

(c) The inmate is a juvenile (under 18) and written consent has not been obtained from his parent or guardian. If the juvenile inmate's parents or guardians are not known or their addresses are unknown, the Warden of the institution shall notify the representative of the

news media of the inmate's statute as a juvenile, and shall then consider the authorization after placing a copy of the inmate's written consent in his file.

(d) Such interview, in the opinion of the Warden of the institution, would endanger the health or

safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution.

(e) The inmate is involved in a pending court action and the court having jurisdiction over the matter has issued a "gag rule." In the case of unconvicted persons (including competency commitments under 18 U.S.C. 4244 and 4246) held in Federal institutions, interviews should not be authorized until there is clearance with the court having jurisdiction, ordinarily through the U.S. Attorney's office. In some districts, there may be a standing authorization for interviews, in the absence [9] of individual "gag orders," but in other districts, all pretrial inmates may need to be cleared upon request for interviews.

(f) The inmate is a "protection" case and revelation of his or her whereabouts would endanger his or her safety.

(6) Interviews will be held in the institution visiting room during normal weekday business hours unless the Warden of the institution determines that another location is more suitable. Interviews will be limited to two one-hour interviews per inmate per month. If the Warden determines that interviews are imposing a serious drain on the staff or use of the facilities, interview time for the entire institution may be limited. Such a limit shall be established on an institution-by-institution basis and shall be made a part of the institution's policy covering this subject. Due to the special security, custodial, and supervisory requirements necessitated by such interviews, an inmate in segregation, restricted, holdover, or hospital status may be limited to a one-hour interview per month.

(7) Interviews will not be subject to auditory monitoring or supervision.

(8) Photographs or audio or video recordings may be taken during interviews in accordance with the conditions outlined in 4b(2). If the Warden of the institution determines that the presence of video, film, or audio equipment or personnel would be likely to create a disruption within the institution, such equipment or personnel may be limited. For example, in the case of inter-

views conducted in visiting rooms which are frequently crowded, or in visiting rooms of maximum security institutions, the Warden may limit the equipment to hand held cameras or recorders.

(9) If in conjunction with an interview of an individual inmate the news media representative wishes to tour [10] the institution and take photographs or make recordings of other inmates, he or she must comply with the procedures set out in 4b(2).

e. *Press Pools.*

Whenever the frequency of requests for interviews and visits reaches a volume as is determined by the Warden to warrant limitations, a press pool may be established. In this situation, all news media representatives having requested interviews or visits which have not been con-

ducted shall be notified that selected representatives shall be admitted to the institution to conduct interviews under such guidelines as the Warden establishes. All material generated from such a press pool shall be made available to all news media, without right of first publication or broadcast. The press pool shall be composed of no more than one representative from each of the following groups present. The representatives shall be selected by the members of the respective groups.

(1) The national and international news services;
(2) The television and radio networks and outlets;
(3) The news magazines and newspapers; and,
(4) All media in the local community where the institution is located.

f. *Release of Information.*

(1) Announcements of unusual incidents shall be made to local news media as promptly as possible by the Warden or by a staff member designated by him. The institution will prepare a statement for release to the media, briefly stating the facts. The text of such messages shall be transmitted to the Bureau as part of the reports required on the incidents to which they relate. If it can reasonably be assumed that the wire services or the Washington press will make inquiry at the Central Office, the text should be communicated to the Central Office by telephone.

(2) Announcements related to Bureau Policy, such as changes in institutional missions, type of inmate popula-

 tion, as well as announcements of changes in executive personnel, will be made by the Central Office. Press inquiries on such subjects shall be referred to the public

information officer of the Bureau of Prisons in Washington.

(3) Information about an inmate that is a matter of public record will be provided by the Warden or his representative to representatives of the news media upon request. Such information shall be limited to the inmate's name, register number, place of incarceration (provided it is not confidential for protection), age, race, offense for which convicted, court where sentenced, length of sentence, date of sentencing, date of arrival, past movements via transfers or writs, general institutional assignments, parole eligibility date, and date of expiration of sentence. Other contents of inmate files are confidential. Requests for additional information about individual inmates shall be referred to the Central Office. The Warden of each institution, or his designated representative, shall be solely responsible for contacts with the press. Other staff members shall refer all press inquiries to the Warden or his designee.

g. *Special Conditions.*

(1) Authorization for institution visits or interviews shall be conditioned upon the news media representative certifying that he or she is familiar with the rules and regulations governing his conduct during interviews and visits and that he or she agrees to comply with them. Certification shall be done by use of an affidavit similar to the attached.

(2) The Bureau has a responsibility to protect the rights of all inmates and members of its staff. It is expected, as a condition for authorizing interviews and making facilities available to conduct an interview, that the news media representative will make a reasonable

attempt to verify any allegations regarding an inmate, [12] staff member, or institution and will provide an opportunity to respond to any allegation which might be published or broadcast prior to such distribution.

(3) *Representatives of the news media will collect information only from the primary source. The Bureau considers it highly improper and a violation of this policy to obtain and use personal information from one inmate about another inmate who refuses to be interviewed.*

(4) While in an institution, representatives of the news media are subject to applicable rules and regulations of the institution. Discussions or comments regarding applicability of any rule, regulation or order should be conducted with the administrator of the institution, or person specifically designated by him.

h. *Interpretations.*
Any question as to the meaning or application of this policy statement will be resolved by the Director of the Bureau of Prisons.

5. ACTION. Institution Policy Statements relating to correspondence and interviews with the news media shall be amended promptly to be in compliance with this issuance. Any modification of this policy statement must be submitted to the Assistant Director, Correctional Programs Division, within 30 days from receipt of this policy statement.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons
Commissioner, Federal Prison Industries, Inc. [13]

Attachment 1

BP-DIR-12 1220.1B
July, 1976 7/1/76

AFFIDAVIT

State of .....) Inmate's Name .....
) ss.:
County of .....) Inmate's Number .....

I, ..., after first being duly sworn, do hereby state that I am primarily employed in the business of gathering or reporting news for a newspaper qualifying as a general circulation newspaper in the community to which it publishes; or a magazine or periodical having a national circulation; or national or international news services; or radio or television news programs holding Federal Communications Commission license.

My employer is (business name) ....., my immediate superior is ....., who may be reached at (phone) .....

I have familiarized myself with Policy Statement 1220.1B governing my conduct during interviews and visits within the institution and agree to comply fully with them.

When allegations are made by the inmate interviewed against the Department of Justice or the Bureau of Prisons, or any staff member, or against another inmate, I agree to give the affected party a reasonable opportunity to respond.

I hereby fully and completely waive my personal right to be free from search of my person or property so long as I remain within the boundaries of the institution grounds.

I agree to provide no compensation, either direct or indirect, to the inmate or his or her family for any interview or correspondence. I further agree to respect the rights of privacy of all inmates and to obtain a release from any inmate before any photos or recordings are utilized or personal information derived from

any interview or correspondence is used in any publication or broadcast. [14]

I recognize a visit to a prison presents certain hazards, and I agree to assume all ordinary and usual risks to my personal safety inherent in a visit to an institution of this type.

.....

(Signature)

Subscribed and sworn to before me this .....
day of ..... 19.....

.....

NOTARY PUBLIC

Copy to: media representative
Original to: inmate's file [15]

Attachment 2
1220.1B

BP-DIR-13
July, 1976

7/1/76

(SAMPLE TRANSMITTAL LETTER)

UNITED STATES PENITENTIARY
Leavenworth, Kansas

.....

Date

The attached letter was placed in our Prisoners Mail Box for forwarding to you. The letter has been neither opened nor inspected. If the writer raises a problem over which this institution or the Bureau of Prisons has jurisdiction, you may wish to write to me or to the Director, Bureau of Prisons, Department of Justice, Washington, D.C. 20534.

You may write back to the inmate, and ask him questions. Your letter will be inspected for contraband, and for any content which would incite illegal conduct or conduct which violates institution rules. Also, personal interviews are permissible under certain conditions.

The Bureau of Prisons encourages the press to visit institutions, and learn about correctional programs and activities. If you wish to do this, please contact me.

Inmates may not receive any compensation, nor anything of value, for correspondence or interviews with the news media. If the person writing you names another inmate or a staff member in his correspondence, we request that you advise us of that fact before its publication. We will provide background information and specific comments whenever possible.

If the writer encloses, for forwarding, correspondence addressed to another addressee, please return the enclosure to me, or to the Director.

Non-compliance with the above must result in a withdrawal of such access. All materials sent to or received from an inmate not authorized herein, or by Bureau policy, shall constitute contraband within the meaning of 18 U.S.C. 1791, which provides a sentence of up to 10 years. This includes the introduction into, or taking from, any correctional institution anything whatsoever contrary to any rule or regulation.

WARDEN [16]

Attachment 3
Page 1
1220.1B

BP-DIR-14
July, 1976

U. S. BUREAU OF PRISONS

Date .....

Inmate's name and number (print) .....

Name of Institution .....

Name of news media representative .....

Name of media represented .....

Address of media represented .....

I, the above-named inmate, do hereby freely give permission to the above-named news media representative to interview me on or about (date) ..... and I do hereby authorize the news media represented by this person to use any information gathered about me during this interview for any legitimate purpose. I further authorize the Bureau of Prisons and the Department of Justice, and their authorized representatives, to release to representatives of the news media any documents or information relating to allegations or comments made by me in this interview.

Inmate's signature .....

Witness ..... Title .....

I, the above-named inmate, refuse permission to the above-named news media representative to interview me.

Inmate's signature .....

Witness ..... Title .....

* * * *

I, the above-named inmate, do further freely give permission to the above-named news media representative to make recordings of my voice during this interview and to take photos of me (still, movie, or video) and I do hereby authorize the use of such pictures or recording by the news media represented by this person for any legitimate purpose.

Inmate's signature .....

Witness ..... Title .....

Original to: inmate's file

Copy to: media representative [17]

DUNIWAY, Circuit Judge (concurring):

I concur, but I confess to having serious doubts about the result, not because I think that it is wrong in principle, but because I have great difficulties in reconciling the result with the decisions in *Pell v. Procunier*, 1974, 417 U.S. 817, and *Saxbe v. Washington Post Co.*, 1974, 417 U.S. 843. I think it clear beyond the possibility of argument that the preliminary injunction from which the appeal is taken grants to KQED and other media greater access to the Santa Rita Jail than is granted to the public.

I cannot reconcile this result with the decisions in *Pell, supra*, and *Washington Post, supra*. As I read these cases, they stand for this proposition:

> ". . . Newsmen have no constitutional right of access to the scene of crime or disaster when the general public is excluded." *Branzburg v. Hayes, supra*, at 684-685. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.
>
> . . . The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. *Branzburg v. Hayes, supra*, and that the government cannot restrain the publication of news emanating from such sources. Cf. *New York Times Co. v. United States, supra*. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court. Accordingly, since § 405.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protection that the First and Fourteenth Amendments guarantee. 417 U.S. at 934-35.

See also Saxbe, supra, 417 U.S. at 850.

I happen to believe that, as to most issues of public importance, and assuming that one accepts the media-created notion [18] that there is such an animal as a constitutionally protected "public's right to know" and further assuming that the media somehow embody that "right," then the media have a protected preferred right to access to information about the public's business. This is based on the proposition that, in our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about the public's business. Witness "Watergate" and its remarkable consequences.

But I cannot reconcile these notions with the express basis for the decisions in *Pell, supra,* and in *Washington Post, supra.* I would like to assume that those decisions are not to be taken literally, but I find nothing in them to support that assumption. Yet I am dubious about the result that they seem to require. It seems to me to be obvious that regulations governing media access to a jail, assuming that the media have a right, along with the public, to such access, must differ from regulations governing access by the public at large. It is one thing to say that representatives of the media, who are not numerous and who can readily be screened, should be able to interview inmates, take pictures, etc., and quite another thing to say that any one of the several million inhabitants of the San Francisco Bay Area, or any one of the million or so inhabitants of Alameda County, should have the same rights. The administrative problems posed by the two are obviously different, and the law ought to recognize the differences. But as I read *Pell, supra,* and *Washington Post, supra,* those cases, far from recognizing these differences, expressly disregard them. Accordingly, I must express doubt, not because I think that I ought to, but because I think that the Supreme Court's decisions require it.

HUFSTEDLER, Circuit Judge, concurring specially:

The holdings of *Pell v. Procunier* (1974) 417 U.S. 817, and *Saxbe v. Washington Post Co.* (1974) 417 U.S. 843, are not directly involved on this appeal. The thorny question is the interpretation of the broad statement in *Pell* that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." [19]

I do not read *Pell* to mean that regulations that are reasonable in controlling access to prisons and prisoners by the general public will always pass the First Amendment test when the same regulations are imposed on the news media. In context, as I read *Pell* and *Saxbe,* the rationale means that the First Amendment does not give news media any special right of access to prisons or to prisoners and none that is not reasonably necessary to serve the public interest in being informed about prisons and prisoners. To the extent that a private person would be properly barred from interviewing prisoners or from entering portions of the prison that are private, the news media can also be barred. Neither *Pell* nor *Saxbe* involved the application of regulations imposing the same standards on news media personnel and members of the general public; in both instances the press had greater latitude than the general public. The Court did not purport to address the question whether news media could be confined constitutionally to regulations controlling access to prisons or to prisoners that govern group tours by the general public.

Although I do not disagree with Judge Pregerson's statement that, under *Pell* and *Saxbe,* "the news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right," I do not believe that the statement is helpful in absence of any description of what the public's right is or how the right is to be vindicated.

Two separate, but related questions are involved: (1) What kind of information about prisons and prisoners does the public

have a right to know? Or, to put the question differently, from what kind of information about prisons and prisoners should the public be excluded? (2) What kinds of limitations can be imposed on the public and on the news media upon the means by which the information to which the public is entitled can be gathered?

The Court in *Pell* recognized that conditions in our Nation's prisons are matters of great public importance about which the public should be informed. To that end, the public's right to knowledge about the conditions of prisons and prisoners is very extensive. Information should not be curtailed except to the extent reasonably necessary to shield the prisoners' small store of personal privacy, to protect the physical security of the prison, [20] the prisoners, and the prison personnel, and to allow prison personnel enough privacy and administrative control to permit them effectively to perform their duties. As the eyes and ears of the public, newsmen are entitled to see and to hear everything within the institution about which the general public is entitled to be informed. The public is not entitled to know everything that the inmates say and do or everything that goes on in the prison. For instance, the public is not entitled to know the contents of the conversations between an inmate and his religious adviser, his lawyer, or his wife, nor to have a transcript of an executive session of prison administrators, nor to know the combination of prison locks. The interests in personal privacy, prison security and discipline, and effective management of the institution in these respects outweigh the public's general interest in being informed about prison conditions. News media, as surrogates for the public, cannot claim any constitutional entitlement to acquire information from which the general public is appropriately excluded.

Assuming that the information to be gathered is of a kind that the public is entitled to know, the question then is focused

on the means by which the information is to be acquired. Here, we are concerned solely with gathering information inside a prison. Prisons, like other public institutions, have some areas from which the public, whether represented by one private citizen or by a member of the news media, must be barred at least some of the time. A prison warden could no more do his job if his private office was always on public display, than could a judge if he were obliged to hold perpetual open house in his chambers. In addition, however, prisons present special problems that do not have exact counterparts in other public institutions where security, discipline, and potential violence are not as omnipresent. Regulations controlling access to prisons and to prisoners, of course, can and should take these special circumstances into account. However, it does not follow that regulations that are reasonable under the circumstances as applied to touring groups of the public are also reasonable as applied to news media personnel.

Guided public tours and news media access do not serve identical purposes nor do they involve identical practical problems. Both kinds of visits are methods of providing to the public [21] information about the prison and prisoners. The media mission, however, is different in degree, though not in kind, from the display to a tour group. The newsmen's function is to gather, to collate, and to transmit to a wide public audience all of the information which the public is entitled to know about prison conditions. A private tour group might have similar or better ability to gather information than newsmen, but it would be rare that the combination of training and the means of transmission enjoyed by the news media would be found in a tour group. An adequate view of prison conditions is unlikely if the observer is confined to the areas of prisons and the times of visitation that are appropriate for conducted tours. As Judge Duniway points out, the administrative problems posed by news-

men and tour groups are very different. For instance, the public is entitled to know about the kind of food that is served and the circumstances under which it is prepared. It would be very difficult to guide a tour group through all of the steps of service and preparation without serious disruption of the service and the kitchen, but a small crew of media personnel could adequately observe and report the proceedings without undue interference. Moreover, it should be obvious that a candid view of prisons and prison life is not possible if both the news media and the general public are limited to white glove inspections at hours and on days scheduled by prison administrators for their own convenience.

I agree with Judge Pregerson that the preliminary injunction issued by the district court is consonant with the teaching of *Pell* and *Saxbe*. [22]

Original Filed
Nov 20 1975

Clerk, U. S. Dist. Court.
San Francisco.

In the United States District Court
for the Northern District
of California

C-75-1257-OJC

KQED, Inc., et al.,
Plaintiffs,

v.

Thomas L. Houchins,
Defendant.

PRELIMINARY INJUNCTION

In accordance with the Memorandum and Order in the above-captioned action, and good cause appearing therefor,

IT IS HEREBY ORDERED that defendant Thomas L. Houchins, his agents, subordinates, employees and all other acting in accordance with him are preliminarily enjoined during the pendency of this action from excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein.

IT IS HEREBY FURTHER ORDERED that defendant is preliminarily enjoined from denying KQED news personnel and responsible representatives of the news media access to the

Santa Rita facilities, including Greystone, at reasonable times and hours.

IT IS HEREBY FURTHER ORDERED that defendant is preliminarily enjoined from preventing KQED news personnel and responsible representatives of the new media from utilizing [1] photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities.

IT IS HEREBY FURTHER ORDERED that defendant may, in his discretion, deny KQED and responsible representatives of the news media access to the Santa Rita facilities for the duration of those limited periods when tensions in the jail make such media access dangerous.

Dated: November 19th, 1975.

OLIVER J. CARTER
United States District Judge [2]

Original Filed Nov 20 1975
Clerk, U. S. Dist. Court.
San Francisco.

In the United States District Court
for the Northern District
of California

C-75-1257-OJC

KQED, Inc., et al.,
Plaintiffs,
v.
Thomas L. Houchins,
Defendant.

MEMORANDUM AND ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

On June 17, 1975 plaintiffs KQED and two local branches of the National Association for the Advancement of Colored People filed a civil rights complaint against the Sheriff of Alameda County, alleging deprivation of First and Fourteenth Amendment rights by virtue of defendant's exclusion of KQED news personnel from the Alameda County Jail at Santa Rita. Plaintiffs concurrently filed a motion for preliminary injunction. At a conference in chambers the Court indicated an intention to issue a preliminary injunction and urged the parties to arrive at mutually agreeable terms. Upon their failure to do so, an evidentiary hearing was held. Based upon testimony taken at the hearing and presentation of a substantial body of documentary evidence, today the Court grants injunctive relief.

A summary of the background of this case facilitates understanding of the Court's rationale for granting such relief. The complaint alleged that KQED, as a local nonprofit, publicly-supported corporation engaged in educational [1] television and radio broadcasting, has a long-standing concern with prisons

and jails in the San Francisco Bay Area and has regularly reported on newsworthy events at such institutions. On March 31, 1975 KQED's Newsroom program reported the suicide of an inmate in the Greystone portion of Santa Rita, together with certain allegations made by a Santa Rita psychiatrist as to jail conditions. Newsroom's anchorman requested permission of Sheriff Houchins to inspect the Greystone facility and was refused on grounds of "policy". The complaint further alleged that such refusal was arbitrary and served no legitimate public interest. Plaintiffs sought an order enjoining defendant from excluding KQED from covering newsworthy events at Santa Rita, including the Greystone portion of the jail.

As of July 14, 1975 the Sheriff began implementation of a program of monthly public tours of Santa Rita, with reservations on a first come, first served basis. Ground rules for the tours included a prohibition of any conversation with inmates and a ban on cameras and tape recorders. In opposing the motion for preliminary injunction defendant has contended that the public tours, together with the inmates' mail and visiting privileges, afford adequate media access.

In so contending, defendant has placed great reliance on dictum from *Pell v. Procunier*, 417 U.S. 817, 834 (1974) to the effect that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." In *Pell* the Supreme Court upheld a California State Prison regulation prohibiting interviews with individual inmates specifically designated by representatives of the press. The Court found a substantial governmental interest in curtailing the practice of concentrating attention on a small number of inmates who thereby had become "public figures" within the prison and the source of severe disciplinary [2] problems. However, the Court carefully noted that the subject regulation was not designed to frustrate media investigation and reporting of prison conditions and that the media has access not only to a program of public tours but

also to interviews of inmates selected at random—precisely the access sought by plaintiffs in this case. Therefore, this Court reads *Pell* as standing for the proposition that a prison or jail administrator may curtail media access upon a showing of past resultant disruption or present institutional tensions. Defendant has not made such a showing in this case.

Defendant's presentation at the evidentiary hearing focused on the program of public tours, tracing the tours' itinerary and introducing photographs of the jail which are offered for sale at the tours' conclusion. There was testimony that the tour groups, which are limited to twenty-five persons, include people from all walks of life. Sheriff Houchins admitted that funding by the Board of Supervisors has not been secured for the tours beyond this December, although he intends to urge continued funding of an expanded program. Plaintiffs argued, however, that all tours were completely booked shortly after their announcement and thus KQED presently has no access to the jail. Moreover, plaintiffs' witnesses stressed the inadequacy of the tours for media purposes because of the lack of opportunity to photograph conditions, interview inmates and cover newsworthy events as they occur. As developed at the hearing, not only do the public tours fail to enter certain areas of the jail, but the photographs offered for sale omit certain of the jail's characteristics, such as catwalks located above the cells.

Inadequacy of the present Santa Rita press policy seems more apparent in view of the testimony of San Francisco County Sheriff Richard Hongisto and San Quentin's Public [3] Information Officer William Merkle. Sheriff Hongisto permits media interviews of inmates at the four jails under his jurisdiction and has not experienced any resultant disruption. Mr. Merkle testified that San Quentin inmates are interviewed by the media with no security or prison administration problems. Their testimony indi-

cates that a more flexible press policy at Santa Rita is both desirable and attainable.

Sheriff Houchins admitted that because Santa Rita has never experimented with a more liberal press policy than that presently in existence, there is no record of press disturbances. Furthermore, the Sheriff has no recollection of hearing of any disruption caused by the media at other penal institutions. Nevertheless Sheriff Houchins stated that he feared that invasion of inmates' privacy, creation of jail "celebrities," and threats to jail security would result from a more liberal press policy. While such fears are not groundless, convincing testimony was offered that such fears can be substantially allayed.

As to the inmates' privacy, the media representatives commonly obtain written consent from those inmates who are interviewed and/or photographed, and coverage of inmates is never provided without their full agreement. As to pre-trial detainees who could be harmed by pre-trial publicity, consent can be obtained not only from such inmates but also from their counsel. Jail "celebrities" are not likely to emerge as a result of a random interview policy. Regarding jail security, any cameras and equipment brought into the jail can be searched. While Sheriff Houchins expressed concern that photographs of electronic locking devices could be enlarged and studied in order to facilitate escape plans, he admitted that the inmates themselves can study and sketch the locking devices. Most importantly, there was substantial testimony [4] to the effect that ground rules laid down by jail administrators, such as a ban on photographs of security devices, are consistently respected by the media.

Thus upon reviewing the evidence concerning the present media policy at Santa Rita, the Court finds that plaintiffs have demonstrated irreparable injury, absence of an adequate remedy at law, probability of success on the merits, a favorable public interest,

and a balance of hardships which must be struck in plaintiffs' favor.

In fashioning the form of preliminary injunction, however, the Court has carefully refrained from usurping the Sheriff's role as jail administrator. By way of this Memorandum the Court merely notes that meaningful press access to a jail includes some use of cameras and inmate interviews. The specific methods of implementing such a policy must be determined by Sheriff Houchins. Of course, should a situation arise in which jail tensions or other special circumstances make such implementation dangerous, defendant can restrict media access for the duration of such circumstances. If plaintiffs believe that a dangerous situation does not in fact exist, they are likewise free to make such a showing to the Court.

Accordingly, IT IS ORDERED that plaintiffs' motion for a preliminary injunction be, and the same is, hereby granted, subject to the restrictions set forth in the form of preliminary injunction.

Dated: November 19th, 1975.

OLIVER J. CARTER
United States District Judge [5]

United States Court of Appeals for the Ninth Circuit

No. 75-3643

KQED, Inc., Alameda Branch and Oakland Branch, National Association for the Advancement of Colored People,
Plaintiffs-Appellees,

vs.

Thomas L. Houchins, individually and in his official capacity as Sheriff of Alameda County,
Defendant-Appellant.

ORDER

Before: DUNIWAY and HUFSTEDLER, Circuit Judges, and PREGERSON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable Harry Pregerson, United States District Judge for the Central District of California, sitting by designation. [1]

Supreme Court of the United States

No. A-594

Thomas L. Houchins, Sheriff of the County of Alameda, California,
Applicant,

v.

KQED, Inc., et al.

On Application for Stay.

[February 1, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Houchins is the sheriff of Alameda County in the State of California and in that capacity controls access of the press and public to the Alameda County jail. Respondents KQED, Inc., a nonprofit educational television-radio station, and the Alameda and Oakland branches of the NAACP, sued applicant in the United States District Court for the Northern District of California in order to obtain an injunction granting KQED personnel access to the Alameda County jail at Santa Rita. The District Court granted respondents a preliminary injunction on November 20, 1975, which restrained applicant:

> ". . . [F]rom excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein.
>
> ". . . [F]rom denying KQED news personnel and responsible representatives of the news media access to the Santa Rita facilities, including Greystone, at reasonable times and hours.

". . . [F]rom preventing KQED news personnel and [1] responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities. [Applicant] may, in his discretion, deny KQED and responsible representatives of the news media access to the Santa Rita facilities for the duration of those limited periods when tensions in the jail make such media access dangerous."

Applicant sought a stay of this order in the Court of Appeals for the Ninth Circuit, and a two-judge panel of the court granted the stay on December 24, 1975, observing that:

"the injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier,* 417 U. S. 817 (1974) and *Saxbe v. Washington Post Co.,* 416 U. S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay."

Applicant's appeal was thereafter heard by a different panel of the Court of Appeals which affirmed the order of the District Court. Applicant filed a petition for rehearing and suggestion for rehearing en banc, and a motion for stay of mandate, all of which were denied. He now requests that I stay the injunction pending the filing and disposition of a petition for certiorari to review the judgment of the Court of Appeals. For the reasons set forth below, I grant his application.

The dispute between the parties centers upon questions of law, rather than of fact. The principal dispute involves the interpretation of our opinion in *Pell v. Procunier,* 417 U. S. 817 (1974). Applicant would urge that we reach the same result in this case as we did in *Saxbe v. Washington Post Co.,* 417 U. S. 843 (1974):

"We find this case constitutionally indistinguishable from *Pell v. Procunier, ante,* p. 817, and thus fully controlled by the holding in that case. '[N]ewsmen have no [2] constitutional right of access to prisons or their inmates beyond that afforded the general public.' *Id.,* at 834." *Saxbe,* 417 U. S., at 850.

Respondents, on the other hand, rely upon the Court's observation at the outset of the opinion in *Pell* that the prison regulation there involved was:

". . . not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current correction policy, both the press and the general public are afforded full opportunities to observe prison conditions. . . . In short, members of the press enjoy access to California prisons that is not available to other members of the public." *Id.,* at 831.

Concededly the access of the public and the press to the Alameda County jail is less than was their access to the California prisons in *Pell.* Public access to the Alameda County jail at Santa Rita presently consists of monthly public tours which, in the words of the Court of Appeals, "were limited to 25 people, booked months in advance, prohibited use of cameras or sound equipment, prohibited conversation with inmates, and omitted views of many parts of the jail, including the notorious Greystone building." Here the injunction did grant to the press greater[1] access to the jail than the pubilc is granted, a result seemingly inconsistent with our holding[2] in *Pell* that the press is not entitled to greater access. But respondents suggest that the access given to the press in this case by the injunction may, as a factual

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1. See *KQED, Inc. v. Houchins,* (CA9, No. 75-3643, Nov. 1, 1976), Slip op., at 18 (Duniway, J., concurring).

2. See *Saxbe v. Washington Post, supra,* at 850. [3]

matter, not significantly exceed that given to the press in *Pell* before the injunction and after our disposition of that case.

The Court of Appeals struggled with the resolution of this issue. Judges Chambers and Sneed, in granting the stay before argument, felt that the injunction went beyond that which we countenanced in *Pell*. The panel that decided the issue on the merits unanimously affirmed the District Court, but each member of the panel wrote separately. In discussing the injunction, which he felt clearly granted the press greater access than is granted to the public, Judge Duniway, in his concurring opinion, was moved to conclude:

> "I cannot reconcile this result [the injunction] with the decisions in *Pell, supra,* and *Washington Post, supra.*" *KQED, Inc. v. Houchins,* Slip op., at 18. (Duniway, J., concurring.)

Judge Hufstedler, concurring specially, viewed the reconciliation of the injunction in this case with the holdings in *Pell* and *Washington Post* as a "thorny question." *Id.*, at 19.

The legal issue to be raised by applicant's petition for certiorari seems quite clear. If the "no greater access" doctrine of *Pell* and *Saxbe* applies to this case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this Court of the propriety of the injunction, in light of those cases, would be appropriate, although not necessary. In my opinion at least four Justices of this Court would vote to grant certiorari to resolve this issue, if for no other reason than that departure from unequivocal language in one of our opinions which on its face appears to govern the question ought to be undertaken in the

first instance by this Court, rather than by the Court of Appeals or by the District Court.

Of course, I accord due deference to the judges of the Ninth Circuit who declined to grant the stay. See *Winters v. United States,* 89 S. Ct. 57, 21 L. Ed. 2d 80 (1968) (Douglas, J., in chambers). But such deference does not relieve me of the obligation to decide the issue:

> "Although a judge of the panel which entered this order [4] refused to grant a stay, I would nevertheless stay the order if persuaded by the record that the questions presented for review in the petition for certiorari had sufficient merit to make review by this Court likely." *Board of School Commissioners v. Davis,* 84 S. Ct. 10, 11, 11 L. Ed. 2d 26, 27 (1963) (Black, J., in chambers).

For the reasons set forth above, I think that the issue in this case is of sufficient importance to surmount the threshold barrier confronting all stay applications: reasonable likelihood that the petition for certiorari will be granted. *E. g., English v. Cunningham,* 80 S. Ct. 659, 4 L. Ed. 2d 42 (1959) (Frankfurter, J., in chambers).

Respondents suggest that, regardless of the correctness of the decision below, the equities do not favor the applicant, and that it is they, the respondents, who will suffer the irreparable injury should a stay be granted. Respondents contend that they are irreparably injured each time they are denied news coverage; applicant suggests that in the District Court hearing "there was uncontradicted evidence that jail operations come to a virtual standstill in the presence of a media tour." Respondents' intimation that the interim denial of their access to the prison, in violation of their asserted First and Fourteenth Amendment rights, will inexorably injure them in a way that applicant cannot be injured by the injunctive restraint—which he asserts is based on a

misapprehension of the Constitution—is one with which I cannot agree. There are equities on both sides of the case.

I would be more hesitant to disturb the District Court's preliminary injunction if it were evident that the injunction were actually "preliminary" to substantial further proceedings which might substantially modify that injunction. But the injunction was issued some 15 months ago, after a full evidentiary hearing, and none of the parties suggests that there are any new factual or legal issues which would cause the District Court to modify it. The injunction has in fact been stayed virtually since its issuance, and I conclude that, in light of the present posture of the case and given the sub-[5]stantial chance that the petition for certiorari will be granted, the preservation of that status quo is an important factor favoring a stay. This is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time. See *Edelman v. Jordan*, 414 U. S. 1301, 1303 (1973) (REHNQUIST, J., in chambers).

The preliminary injunction issued by the District Court in this case on November 20, 1975, should therefore be and hereby is stayed pending the filing of a timely petition for certiorari by applicant, and the disposition of the petition and the case by this Court. [6]

APPENDIX

In The

Supreme Court of the United States

October Term, 1976

No. 76-1310

THOMAS L. HOUCHINS, SHERIFF OF THE COUNTY OF ALAMEDA, CALIFORNIA,
Petitioner,

—v.—

KQED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 22, 1977
CERTIORARI GRANTED MAY 23, 1977

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1310

THOMAS L. HOUCHINS, SHERIFF OF THE COUNTY OF ALAMEDA, CALIFORNIA,
Petitioner,

—v.—

KQED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 22, 1977
CERTIORARI GRANTED MAY 23, 1977

Docket Entries

1975

June 17	Complaint filed, Summons Issued
June 17	Notice of Motion for Preliminary Injunction filed
July 9	Answer to Complaint filed
July 10	Defendant's Memorandum in Opposition to to Motion for Preliminary Injunction filed
July 15	Plaintiff's Reply Memorandum filed
July 24	Plaintiff's Second Supplemental Reply Memorandum filed
July 28	Clerk's Notice of Continuing Hearing on Motion for Preliminary Injunction to July 30, 1975, filed
July 28	Plaintiff's Supplemental Reply Memorandum filed
November 10	Minute Order: Motion for Preliminary Injunction Submitted
November 20	Preliminary Injunction Issued
November 20	Memorandum and Order Granting Motion Preliminary Injunction
December 4	Notice of Appeal by Defendant filed
December 5	Order From Ninth Circuit Court of Appeals staying District Court's Preliminary Injunction for 10 Days, or Until Appellant's Application is Determined, filed (Duniway, J.)

1976

January 12	Order from Ninth Circuit Court of Appeals, Denying Modification or Clarification of Stay Order and Granting Expendition
January 16	Certified copy of Order from Ninth Circuit Court of Appeals: Upon due consideration, the Petition for Stay of Injunction Pending Appeal is granted. Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay (Chambers and Snead, JJ)
January 21	Record on Appeal mailed to Ninth Circuit Court of Appeals

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Attorneys for Plaintiffs

ORIGINAL
FILED
June 17, 1975
Clerk, U.S. Dist. Court
San Francisco

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KQED, INC., ALAMEDA BRANCH and OAKLAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

vs.

THOMAS L. HOUCHINS, individually and in his capacity as Sheriff of Alameda County,

Defendant.

Civil Action No. C 75 1257 SAW

COMPLAINT FOR EQUITABLE RELIEF
(Civil Rights)

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343 (3). This is a suit authorized by 42 U.S.C. §1983 to redress the deprivation by defendant, acting under color of state law, of plaintiffs' rights, privileges and immunities secured by the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

PARTIES

2. Plaintiff KQED, Inc. is a California non-profit corporation engaged in educational television and radio broadcasting. Publicly-supported, KQED serves the counties in the San Francisco Bay Area. KQED maintains a regular daily television news program on Channel 9, entitled "Newsroom".

3. Plaintiffs Alameda Branch and Oakland Branch of the National Association for the Advancement of Colored People ("NAACP") are unincorporated associations, and local branches of the national NAACP. Their members reside in Alameda and Oakland in Alameda County, California. The NAACP plaintiffs, on their own behalf and on behalf of black people generally, have a long-standing dedication to bringing about equal justice under law, including equal justice for persons accused of crime and held in jails. Their members have a special concern with conditions at the Alameda County jail at Santa Rita, because the prisoner population at the jail is disproportionately black. They depend on the public media to keep them informed of such conditions so that they can meaningfully participate in the current public debate on jail conditions in Alameda County and many of the NAACP plaintiffs' members rely regularly on KQED's Newsroom program to keep them informed on these issues.

4. Defendant Thomas L. Houchins is the Sheriff of Alameda County. He is sued individually and in his capacity as Sheriff. As Sheriff, defendant Houchins has general supervision and control of the Alameda County jail facilities at Santa Rita.

CLAIMS FOR RELIEF

5. KQED's Newsroom program has had a long-standing concern with prisons and jails in the San Francisco Bay Area. It has reported regularly on newsworthy events at San Quentin State Prison, Soledad Prison, the San Francisco County jails at San Bruno and in San Francisco, and the Alameda County jail at Santa Rita. Plaintiffs believe that jails and prisons are public institutions managed by public officials who are accountable to the public, and therefore

information concerning such institutions should be reported by the news media when newsworthy events occur.

6. KQED's Newsroom program of March 31, 1975, reported on the suicide of a black inmate named Alvin Holly in one of the cells maintained by defendant Houchins in the Greystone portion of Santa Rita. Newsroom's information was that such suicide occurred two days after an Alameda County Superior Court Judge had ordered a psychiatric examination on Holly's request, but the examination was not in fact provided by defendant's agents or subordinates. By way of background, Newsroom reported also on the previous decision of this Court finding that the Santa Rita facility in which the suicide took place violated "basic standards of human decency" and therefore constituted cruel and unusual punishment. (See **Brenneman v. Madigan,** 343 F. Supp. 128, 132-33 (N.D. Cal. 1972)).

7. In the same program, KQED's Newsroom also reported statements by a psychiatrist assigned to Santa Rita to the effect that cells at the Greystone facility were responsible for the illnesses of his patient-prisoners there. Newsroom also reported the reaction of defendant Houchins to the Holly suicide and the the allegations made by the Santa Rita psychiatrist. Defendant was quoted by Newsroom as denying that the cells were responsible for the illnesses of the prisoners.

8. On March 31, 1975, in connection with the news stories relating the suicide and the allegations of the Santa Rita psychiatrist, Newsroom's Anchorman Melvin S. Wax telephoned defendant Houchins and requested permission to inspect the Greystone facility. Defendant flatly refused. When asked the reason, defendant said only that it was "policy".

9. In part as a reaction to the Holly suicide and the allegations of the Santa Rita psychiatrist, the Board of Supervisors of Alameda County ordered an investigation by the County Administrator. The report was received by the Board of Supervisors on May 13, 1975, and this was reported by KQED's Newsroom, but the report did not discuss cell conditions at Greystone. A public hearing on the report and the conditions at Santa Rita was held in Oakland, California,

on May 20, 1975, and this was reported by KQED's Newsroom. The Board of Supervisors ordered another report in 30 days.

10. KQED believes that it is essential to public understanding of the conditions prevailing at the Santa Rita Greystone facility, and the issues of jail reform involving such conditions, that the public be informed in detail of the exact nature of such conditions. The most effective way of informing the public would be by television coverage including filming the actual cells and facilities. The next most effective means of informing the public would be for a media reporter to inspect such cells and facilities, interview prisoners, and report thereon. KQED is ready, willing and able to gather such news and undertake such reporting, but has been barred from doing so by defendant Houchins.

11. The action of defendant Houchins in barring KQED from Greystone is neither necessary nor essential to serve any legitimate governmental interest. Such action is unreasonable, arbitrary and not based on any actual danger to jail security. Nor has defendant provided any effective alternative means by which the public may be informed of conditions prevailing in Greystone or by which prisoners' grievances may reach the public.

12. The action of defendant Houchins in barring KQED coverage of conditions in Greystone and in barring public access to Greystone deprives the NAACP plaintiffs' members of their right to know and receive information on such conditions and thus to participate meaningfully in the public debate, presently being conducted in Alameda County, with regard to jail reform and the possible construction of new jail facilities.

13. Defendant's action in denying KQED and the public access to Greystone therefore denies plaintiffs their rights under the First and Fourteenth Amendments to the United States Constitution.

BASIS FOR EQUITABLE RELIEF

14. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for an injunction is their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendant's actions as alleged herein.

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment granting plaintiffs:

(a) A preliminary and permanent injuction enjoining defendant from excluding KQED news personnel from the Greystone cells and Santa Rita facilities and generally preventing full and accurate news coverage of the conditions prevailing therein.

(b) Plaintiff's cost of this suit, including reasonable attorneys fees; and

(c) Such other and further relief as the Court may deem just and proper.

WILLIAM BENNETT TURNER

WILLIAM BENNETT TURNER

* * *

ORIGINAL
FILED
JUNE 17, 1975
CLERK, U.S. DIST. COURT
SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

NOTICE OF MOTION FOR
PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE that the undersigned will move this Court on the 17th day of July, 1975, at 2:15 p.m. in Courtroom No. 8, or as soon thereafter as counsel can be

heard, for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant, during the pendency of this action, from excluding KQED from the Alameda County jail facilities at Santa Rita. This motion is based on the annexed memorandum in support of preliminary injunction, the affidavits attached thereto and all other proceedings filed or had herein.

WILLIAM BENNETT TURNER

Dated: June 17, 1975 WILLIAM BENNETT TURNER

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

AFFIDAVIT OF MELVIN S. WAX

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

MELVIN S. WAX, being duly sworn, deposes and says:

1. I am the Anchorman of the "Newsroom" program presented every weekday by KQED, Inc. on Channel 9 in the San Francisco Bay Area. I make this affidavit in support of plaintiffs' motion for a preliminary injunction providing KQED with access to the Alameda County jail facility at Santa Rita.

2. I have worked in the field of journalism since 1940. I have been a newspaper reporter and publisher in San Francisco, Chicago, and New England. I have worked in television journalism since 1967. I founded KQED's Newsroom program and have served as its Anchorman ever since.

3. KQED's Newsroom program has had a long standing concern with prisons and jails in the San Francisco Bay Area. Newsroom has reported regularly on newsworthy

events at San Quentin State Prison, Soledad Prison, the San Francisco County Jails at San Bruno and in San Francisco and the Alameda County Jail at Santa Rita. We believe that jails and prisons are public institutions managed by public officials who are accountable to the public, and therefore information concerning such institutions should be reported by the news media. Specifically (and by way of example only), in recent years Newsroom has covered — with film, video or still cameras on the premises of the correctional institutions involved — the following:

SAN FRANCISCO CITY AND COUNTY FACILITIES

Date	Story and Description
February 1, 1972	Men's Jail — City Prison — film
February 2, 1972	Women's Facilities — City Prison and County Jail — film
February 2, 1972	Special one-and-a-half hour live video on location from County Jail at San Bruno
March 13, 1973	Suit challenging conditions at San Bruno — still photographs
April 30, 1973	Interview with Under Sheriff Smith and interior film of San Bruno Jail
November 14, 1973	Interview with Sheriff Hongisto about jail conditions — film
March 18, 1974	Conditions at County Jail 1 and 3 — film
March 5, 1974	Jail Park — new facility for prison visitors at San Bruno — film

SAN MATEO COUNTY

Date	Story and Description
March 15, 1974	Ellsworth House and how it works — film

SANTA CLARA COUNTY

Date	Story and Description
1974	Ruchell Magee interviewed in Santa Clara County Jail — film

SAN QUENTIN

Date	Story and Description
September 1, 1971	Three guards interviewed after George Jackson incident — film
November 21, 1972	Cell blocks of San Quentin — film
October 23, 1973	Facilities for family visits — film
November 8, 1973	Media access to San Quentin, including shots of prisoners — film
December 4, 1973	Lockdown at San Quentin — shots of prisoners — interview with official — film

Date	Story and Description
December 27, 1973	Followup on lockdown — film
March 21, 1974	Old buildings at San Quentin — film
May, 1974	General interior pictures of San Quentin — no story done but still photographs taken to be used in future

SOLEDAD PRISON

Date	Story and Description
1972	General interior and exterior pictures taken for file purposes

4. Based on my own experience with the above stories, and on the experiences of the reporters and crews as reported to me, there have been no instances of endangering reporters, crews or staff, no endangering of the inmates or officials of the institutions concerned, and no [illegible]uptions of either the television crew's business or the [illegible]ectional institution's business.

5. In all of the stories that Newsroom has done in and about prisons and jails, we have taken precautions to protect the privacy of the inmates. We have not photographed or interviewed inmates who do not desire to be photographed or interviewed, and this is our policy.

6. In addition to the above stories done on location at various correctional institutions, KQED has of course reported on stories of general interest regarding jails and prisons in California and in the Bay Area. One such story began with the report on Newsroom on March 31, 1975, of the suicide of an inmate named Alvin Holly at Santa Rita in Alameda County. We received information that such suicide occurred two days after an Alameda County Superior Court Judge had responded to Holly's request for a psychiatric examination by ordering such an examination. Our information was that the examination was not provided by the Sheriff's Department or other county employees, and the suicide followed. In this story, by way of background, we reported also on the decision of the federal court in San Francisco to the effect that the Santa Rita facility where the suicide took place was "unfit for human habitation." In the same report, we included statements by a psychiatrist assigned to Santa Rita to the effect that conditions at the Greystone facility at the jail were responsible for the illnesses of his patient-prisoners there. We also reported the reaction of Sheriff Houchins to the suicide and to the allegations made by the Santa Rita psychiatrist. We quoted the Sheriff as denying that the conditions were responsible for the illnesses of prisoners.

7. On March 31, 1975, in connection with these news stories, I telephoned Sheriff Houchins and requested permission to inspect the Greystone facility and take pictures there. The Sheriff refused. When I asked the reason for his refusal, he responded only: "Policy". No rule or written policy of any kind was mentioned.

8. Newsroom followed up these stories by reporting on a report by the County Administrator to the Alameda County Board of Supervisors on May 13, 1975. The report was called

for by the Board as a reaction to the Holly suicide and the allegations of the Santa Rita psychiatrist regarding conditions at Santa Rita. The report, however, did not discuss conditions in the cells at Greystone.

9. Newsroom further reported on a public hearing regarding the County Administrator's report to the Board of Supervisors, held in Oakland on May 20, 1975. The Sheriff did not appear at the hearing. A male nurse from Santa Rita described instances of cruelty and shocking conditions at Santa Rita. The Board of Supervisors called for another report from the County Administrator within 30 days.

10. As a television journalist with experience in reporting on jail and prison conditions, I believe that it is essential to public understanding of the conditions prevailing at the Greystone facility and the Santa Rita jail in general, that the news media report in detail on the exact nature of such conditions. The most effective way of informing the public on the conditions would be television coverage including pictures of the actual cells and facilities. I believe that this can be accomplished at Santa Rita without danger to jail security, or to the safety of media personnel, inmates or officials. The next most effective means of informing the public would be for a news reporter to inspect the cells and facilities and report thereon. I am ready, willing and able, on behalf of KQED, to undertake such activities, but I have been barred from doing so by Sheriff Houchins.

/s/ MELVIN S. WAX
MELVIN S. WAX

(JURAT OMITTED IN PRINTING)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

AFFIDAVIT OF JOSEPH M. RUSSIN

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

JOSEPH M. RUSSIN, being duly sworn, deposes and says:

1. I am the News Director on KQED, Inc. On February 2, 1972, KQED televised a live program including live remote video and sound from the San Francisco County Jail at San Bruno. I produced the program.

2. The program was presented live from San Bruno and lasted for 1 hour. It included pictures of the jail facilities, cells, inmates and staff, as well as interviews with inmates. During the program several KQED personnel were in the jail, including the producer, the reporter, the camera man, a floor man, a remote supervisor and an audio man.

3. In preparation for the live program I or other KQED personnel went to the jail at San Bruno on two or three occasions for the purpose of scouting the program, ascertaining the layout, best camera angles, etc.

4. To my knowledge, normal security prevailed both during the hour program and on the scouting occasion; no special precautions were taken. There was no endangering of KQED staff, or inmates, or jail personnel caused by the program, to my knowledge. Nor was there any disruption of jail security caused by the program.

5. We were able to protect the privacy of the jail inmates. No inmate was photographed or interviewed against his will or desire. In addition, we obtained written releases from inmates who appeared on the program.

/s/ JOSEPH M. RUSSIN
JOSEPH M. RUSSIN

(JURAT OMITTED IN PRINTING)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

RICHARD D. HONGISTO, being duly sworn, deposes and says:

1. I am the Sheriff of San Francisco County. I have a Master's Degree in Criminology from the University of California at Berkeley. I have ten year's experience in law enforcement with the San Francisco Police Department. In my capacity as Sheriff, I have the general supervision and control of the jails in the County.

2. On February 2, 1972, KQED did a special one and a half hour live television program on location in the County Jail at San Bruno. I authorized this program. My authorization included access to the facility by the KQED reporters (Tom DeVries and Carolyn Craven) and the television crew, consisting of several persons. The program included pictures of the facilities at San Bruno as well as interviews with inmates and officers.

3. From my own participation in the program and from reports from subordinates in charge of jail security, I can state that there was no security problem created by the KQED program from the jail. There was no endangering of the KQED reporters or camera crew or staff; nor was there any endangering of my staff or of inmates at the San Bruno facility. Normal security prevailed; there were no special security precautions.

4. For the KQED live program there was no difficulty in protecting the privacy of the inmates. No one was photographed or interviewed against his will or desire.

5. I have also authorized cooperation with KQED on other programs dealing with the San Francisco County Jails. Specifically, I have authorized interviews and film of facilities (including interior shots of facilities) for at least four other KQED programs aired in recent years. None of these programs presented any danger to jail security. None resulted in disorder of any kind.

6. I authorized all of the above KQED programs consistent with my opinion, based on my education and experience in law inforcement and jail administration, that such programs make an important contribution to public understanding of jails and jail conditions. In my opinion jails are public institutions and the public has a right to know what is being done with their tax dollars being spent on jail facilities and programs.

/s/ RICHARD D. HONGISTO
RICHARD D. HONGISTO

(JURAT OMITTED IN PRINTING)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

STATE OF CALIFORNIA }
COUNTY OF ALAMEDA } ss.

BRUCE HENDERSON, being duly sworn, deposes and says:

1. I am a reporter for The Independent, a newspaper published three times weekly serving Dublin, Pleasanton, Sunol, Livermore, San Ramon, Danville and Alamo, in Alameda County. In recent years I have been assigned to cover, among other things, stories relating to the Alameda County Jail at Santa Rita.

2. I had never seen the interior of the facilities at Santa Rita until June 16, 1972. On that day, the then Sheriff of Alameda County, Frank I. Madigan, authorized a conducted press tour of the Santa Rita facilities. I went on that tour, and wrote an article based on it. A true copy of the article is annexed hereto, and the substance of it is incorporated herein by reference.

3. There was a sizeable group of news persons on the conducted tour. Included were television stations with their reporters, cameramen and cameras. In addition, the newspapers were well represented, and they included not only reporters but also photographers. So far as I could observe, the presense of photographers and cameramen with their equipment did not cause any disruption at the jail.

4. As set forth in the article attached hereto, we were admonished at the outset of the tour, and reminded during

the tour, that no conversations with any inmates would be permitted. This somewhat handicapped my ability to understand and write about what I was able to see on the tour, because I could not ask questions of the persons incarcerated in and affected by the facilities we toured.

5. As also stated in the article attached hereto, the facilities we toured appeared to have been freshly scrubbed for our tour. I observed a cleaned up kitchen, a damp floor as though a wet mop had preceded the tour by only a few minutes, and wet paint on the walls of a newly-constructed mess hall. As further stated in the article, one jail inmate did remark to me that "You should have come here yesterday. The place was a real mess."

6. I have not been invited to any press tours since June 16, 1972, and I have not heard of any other such tours being conducted at Santa Rita.

7. Subsequent to the press tour, I sought permission from the Sheriff to interview inmates with regard to conditions at Santa Rita. Permission was denied. This led to the filing of a law suit in federal court in San Francisco and, as a result thereof, it was my understanding that a procedure was set up for press access to inmates at Santa Rita. The procedure required a reporter to present a letter from an inmate consenting to an interview. It was also required that consent be obtained from the inmate's attorney of record. This was quite cumbersome and time-consuming, and the procedure made it difficult for a reporter to interview any prisoners because unless the reporter knew an inmate in the jail and could somehow request the inmate to write a letter consenting to an interview, interviews would be difficult to arrange.

8. The failure of the Alameda County Sheriff to provide better press access to the facilities at Santa Rita has, in my

opinion as a news reporter, handicapped the ability of the press accurately and fully to report on jail conditions at Santa Rita.

/s/ BRUCE HENDERSON
BRUCE HENDERSON

(JURAT OMITTED IN PRINTING)

(EXHIBITS OMITTED IN PRINTING)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

WILLIAM BENNETT TURNER, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court. I am serving as counsel for plaintiffs in this action. I make this affidavit in support of plaintiffs' motion for a preliminary injunction.

2. Upon being asked by KQED to inquire into the legality of the exclusion of KQED from the Greystone cells at Santa Rita, I telephoned Kelvin Booty, Deputy County Counsel for Alameda County, who represents defendant Houchins. I spoke with him on May 12, 1975, and presented the facts alleged in the complaint with regard to KQED's attempt to gain access to Santa Rita. Mr. Booty told me that he was unaware of any formal policy maintained by the Sheriff with regard to press access to Santa Rita.

3. I spoke again with Mr. Booty on May 15, 1975. At that time, he confirmed that the Sheriff had no rule regulation regarding press access, although apparently a press tour had been conducted in the past. Mr. Booty stated that he had advised the Sheriff to develop a firm policy on press access and that a rule or regulation should be forthcoming within a week.

4. On June 3, 1975, I spoke again with Mr. Booty. At that time no press policy had been developed, but Mr. Booty stated that he would be meeting with the jail officials on June 10, 1975. Mr. Booty sent me the Sheriff's Rules for the facilities at Santa Rita. Attached hereto is a true copy of the Rules and Regulations for maximum security inmates, which includes rules on visiting and mail.

5. An examination of the Sheriff's Rules discloses that there is no rule governing press access. There are rules governing visiting and mail. Visiting is limited by Rule 33 (p. 3) for both sentenced and unsentenced inmates to three hours on Sundays, although unsentenced inmates may have visiting at other times as announced. Regarding mail, there is no provision for an inmate to send a sealed communication to any news media. Indeed, Rule 3(g) (p. 4) provides that "all mail (with the exception of "legal" mail), outgoing and incoming, will be inspected." This is true for both sentenced and unsentenced inmates. Moreover, Rule 2(c) forbids inmates from mentioning "the names or actions of any officer" of the jail. This would even forbid a prisoner from complaining that he had been beaten by an officer.

6. On June 10, 1975, I spoke again with Deputy County Counsel Booty. He then informed me that the Sheriff had developed a policy on press access and he outlined it to me. He stated that there would be monthly public tours. These tours would not be expressly for the press, but news reporters could go on the tours. Twenty-five persons per tour would be allowed. They would be required to sign up on a first

come-first served basis. The tours would be held on the second Monday of every month, beginning on July 14, 1975. The tours would include most Santa Rita facilities but would **not** include the cell portions of Greystone. I asked Mr. Booty the Sheriff's reason for not including the Greystone cells, and Mr. Booty said that the reason was "Just because". He said that the Sheriff took the position that he did not have to give a reason for excluding the public and press from this facility. Mr. Booty also stated, in response to my inquiry, that persons on the tours would not be permitted to talk to any inmates whom they encounter while touring the facilities. He said, however, that the tour, which would be conducted by four deputies and a sergeant, would also include a convict as a guide. Finally, Mr. Booty stated that no cameras would be allowed on any tour. Mr. Booty said that the new policy should be in writing within a week.

7. I also asked Mr. Booty on June 10 about the policy governing press interviews of prisoners at Santa Rita. He stated that **no** interviews of convicted prisoners would be permitted (unless, of course, the reporter happened to be a relative or friend of the prisoner). As to pretrial detainees, they could be interviewed only with the consent of the District Attorney, the detainee's attorney of record, and a court order.

WILLIAM BENNETT TURNER
WILLIAM BENNETT TURNER

(JURAT OMITTED IN PRINTING)

(EXHIBIT OMITTED IN PRINTING)

* * *

ORIGINAL FILED
JULY 9, 1975
WILLIAM L. WHITTAKER CLERK,
U.S. DIST. COURT
SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

ANSWER TO COMPLAINT

COMES NOW Thomas L. Houchins, individually and in his capacity as Sheriff of the County of Alameda, State of California, by way of answer to the Complaint for Equitable Relief (Civil Rights) on file herein, admits, denies, and alleges as follows:

I

Answering the allegations of paragraphs 1, 2 and 3, alleges that defendant lacks sufficient information or belief to enable him to answer the allegations of those paragraphs, and on that ground denies each and every, all and singular, generally and specifically, the allegations contained therein.

II

Admits the allegations of paragraph 4.

III

Answering the allegations of paragraphs 5 and 6, alleges that defendant lacks sufficient information or belief to enable him to answer the allegations contained in said paragraphs 5 and 6, and on that ground denies each and every, all and singular, generally and specifically, the allegations contained therein. Further answering the allegations of paragraph 6, defendant alleges that the medical and psychiatric care of inmates at all of the County's custodial

institutions is not now, and has not been at any relevant time herein, under the direction and control of defendant. Defendant futher alleges that if Newsroom reported that the U.S. District Court had found that Santa Rita facility in general "violated 'basic standards of human decency' and therefore constituted cruel and unusual punishment," then Newsroom erroneously reported the decision of this Court in **Brenneman v. Madigan.**

IV

Answering the allegations of paragraph 7, through the words "the Santa Rita psychiatrist" on page 3, line 24 of the Complaint, defendant alleges that he lacks sufficient information or belief to enable him to answer the allegations contained in said paragraph and on that ground denies each and every, all and singular, generally and specifically, said allegations. Answering the last sentence of paragraph 7, defendant alleges that he does not know how he was quoted by Newsroom, but alleges that what defendant in fact said to plaintiff KQED's reporter was that he had no evidence or reason to believe that the cells in Greystone had caused any problem to Mr. Holly which could have resulted in Mr. Holly's death.

V

Answering the allegations of paragraph 8, defendant admits that Mr. Wax telephoned defendant and requested permission to inspect the Greystone facilities, and that defendant refused. Defendant denies that the reason stated by defendant for that refusal was limited to the word "policy," and alleges instead that what defendant said to Mr. Wax in response to the request was that Mr. Wax could not inspect the Greystone facility, because if Mr. Wax were allowed so to inspect, then any other media representative would also have to be granted permission to do so; that considering the number of newspapers, magazines, and television stations in the Bay Area, and the spasmodic disruption of the mealtimes, exercise times, visiting times, and court appearances of the inmates of the institution,

which would be caused by the conducting of innumerable tours upon demand by media representatives, defendant believed that he could not allow such visitations; that accordingly defendant would not permit the inspection by Mr. Wax as requested. Defendant further stated to Mr. Wax that defendant had received many such requests from the press and from television, and from others. Except as herein alleged, defendant denies each and every, all and singular, generally and specifically, the allegations of paragraph 8.

VI

Defendant admits the allegations of paragraph 9, except insofar as they refer to reports by KQED's Newsroom, as to which defendant has no knowledge or belief, and on the basis of that lack of knowledge or belief, denies the allegations with respect to said reporting.

VII

Answering the allegations of paragraph 10, defendant alleges that he lacks sufficient information or belief to enable him to answer the allegations of the first sentence thereof, and on that basis denies each and every, all and singular, generally and specifically, the allegations of said first sentence. Defendant denies the allegations of the second and third sentences of paragraph 10. As to the last sentence in paragraph 10, defendant lacks sufficient information or belief to enable him to answer the allegations concerning the readiness or willingness and ability of KQED to undertake news gathering, and on that basis denies the allegations with respect to KQED. Defendant admits that KQED has in the past been barred from entering the Santa Rita facility for reporting purposes, as hereinabove described, but alleges that, as KQED knows, defendant plans to permit public tours of the entire Santa Rita facility, and any representatives from KQED (or the other plaintiffs) are perfectly free to participate in those public tours, on the terms and conditions applicable to all other participants in those tours. Those terms and conditions are described in defendant's letter of June 19, 1975, to the Board of Supervisors of the County of

Alameda, a true and correct copy of which letter is attached hereto, marked Exhibit "A" and is by this reference incorporated herein as if set forth at length. (There is also attached hereto, marked Exhibit "B", a true and correct copy of the final version of the press release, which exhibit is by this reference incorporated herein as if set forth at length.) As the attached press releases in Exhibits "A" and "B" indicate, the public tour will cover all facilities at the Santa Rita Rehabilitation Center, including the Greystone Complex (and specifically including the cell areas in Greystone). While cameras will not be permitted, photographs of the Greystone area will be on a display and may be purchased by tour visitors. Defendant alleges that the reason that no cameras will be permitted is that with 25 persons, with cameras, defendant would have no control over what was being photographed, including inmates, security operations, and the like, which photographs could be studied later. Similarly, defendant will not permit any interviewing with inmates, because of excessive time consumption, problems with control of the inmates, and problems with control of visitors. Defendant believes that interviewing would be excessively unwieldy.

VIII

Defendant denies that allegations of paragraph 11. Further answering the allegations of paragraph 11, defendant alleges that the public tours described in the above paragraph are an effective alternate means by which the public may be informed of conditions in Greystone, and that in addition, all inmates have access to the media through the United States Mail.

IX

Defendant denies that allegations of paragraph 12, 13, and 14.

WHEREFORE, defendant prays that the Complaint be dismissed, and that he be awarded his costs herein incurred, and for all other appropriate relief.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs Alameda Branch and Oakland Branch, National Association for the Advancement of Colored People, lack standing to maintain the within action in their own right.

SECOND AFFIRMATIVE DEFENSE

No claim upon which relief may be granted has been or could be stated against defendant Thomas L. Houchins in his individual capacity.

Dated: July 9, 1975

RICHARD J. MOORE, County Counsel
County of Alameda, State of California

By KELVIN H. BOOTY, JR.

KELVIN H. BOOTY, JR.
Senior Deputy County Counsel

Attorneys for Defendant

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

EXHIBIT A

June 19, 1975

Honorable Board of Supervisors
Administration Building
1221 Oak Street
Oakland, California 94612

RE: PILOT PROGRAM — TOURS OF SANTA RITA REHABILITATION CENTER

For several months, I have been concerned with the practical difficulties involved in providing time for interested persons to view the Santa Rita Rehabilitation Center. Recent court decisions relating to public access to jail facilities have served to deepen my concern.

The principal impediment to providing the public with opportunities to tour Santa Rita has been the lack of personnel to serve as guides for visitors. It is my proposal that we commence a six-month pilot program of three-hour tours through all the major facilities at Santa Rita. The monthly tour, limited to 25 persons, can be scheduled on the evening of the second Monday of each month, with the first tour to be held on July 14, 1975.

This program can be funded on a special overtime basis, as was Night and Sunday Visiting, to provide sufficient knowledgeable guides. The guides will have opportunity to inform the public of current detention and corrections programs (educational, counseling, etc.) which have been expanded by your Board in recent years.

It is estimated that staffing costs will not exceed $1,800 for the six-month pilot program; at its conclusion, a determination can be made for its continuation. The following is a breakdown of expected costs for one Sergeant and four Deputies.

Estimated Costs for Pilot Program

Staffing required: 1 Sergeant and 4 Deputies at 4 hours per night.

	Sergeant*	Deputy*	4 Deputies	TOTAL
Base Pay 75-76/Month	$1453.00	$1257.00	$	$
Hourly Rate	8.35	7.21		
Overtime Rate	12.53	10.82		
Cost/Month	$ 50.12		$ 173.12	$ 223.24
Cost for Six Months	300.72		1038.72	1339.44
+22% Fringe Benefits	66.16		228.52	294.68
	$ 366.88		$1267.24	$1634.12

*Based on 4th Step, 1975/76 Salary Ordinance.

If the program is approved by your Board, the attached draft press release will be utilized.

T. L. Houchins
Sheriff

TLH: nac
Attachment

cc: Loren Enoch
County Administrator

Donald Parkin
Auditor-Controller

SUGGESTED DRAFT PRESS RELEASE

Sheriff Tom Houchins has announced that a program of guided tours through the Santa Rita Rehabilitation Center will begin on the evening of July 14, 1975. Open to all interested persons, the tour is expected to require approximately three hours for visitors to walk through all major facilities at the Santa Rita Rehabilitation Center.

Arrangements must be made in advance as each tour is limited to a maximum of 25 persons. All persons going on the tours must be at least 18 years of age and may be subject to search prior to entering the facility. No cameras or tape recorders will be allowed.

Tours begin promptly at 6:30 p.m. on each night scheduled: July 14, August 11, September 8, October 13, November 10, and December 8. Interested individuals or groups wishing to make appointments for tours should call the Sheriff's Department at 828-5400, Extension 67, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

EXHIBIT B

SHERIFF'S DEPARTMENT,
ALAMEDA COUNTY COURTHOUSE
1225 FALLON STREET
OAKLAND, CALIFORNIA 94612

JULY 8, 1975 FOR IMMEDIATE RELEASE

Alameda County Sheriff Tom Houchins announces that a program of guided tours through the Santa Rita Rehabilitation Center has been approved by the Board of Supervisors and will begin on the evening of July 14, 1975. Open to all interested persons, the tour is expected to require approximately three hours for visitors to walk through all major facilities at the Santa Rita Rehabilitation Center.

Arrangements must be made in advance as each tour is limited to a maximum of 25 persons. All persons going on the tours must be at least 18 years of age and may be subject to search prior to entering the facility. No cameras or tape recorders will be allowed.

Tours begin promptly at 6:30 p.m., on each night scheduled: July 14, August 11, September 8, October 13, November 10, and December 8, 1975. Interested individuals or groups wishing to make appointments for tours should call the Sheriff's Department at 828-5400, Extension 67, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

NO MORE

* * *

AFFIDAVIT OF THOMAS L. HOUCHINS

Thomas L. Houchins, being first duly sworn, deposes and says:

1. That he is now, and at all relevant times mentioned herein he has been, the Sheriff of the County of Alameda, State of California, and as such Sheriff has charge of all correctional facilities within the County of Alameda.

2. That the media and the public have access both to the inmates of the Santa Rita Rehabilitiation Center and to the facilities and programs themselves through the following:

a. **United States mails.** There are attached hereto, marked Exhibits "A", "B", "C", and "D", true and correct copies of the Rules and Information for the four groupings of Santa Rita inmates — minimum security, medium security, maximum security, and womens' quarters. Each of those exhibits is, by this reference, incorporated herein as if set forth at length. The exhibits are as revised in June, 1975. (It should be noted that the provisions in the former rules concerning not mentioning the names of officers or inmates in correspondence, which rules are referred to by plaintiffs herein, are deleted by the revision.) The mail rules with respect to maximum security inmates, for example, (i.e., those who are housed in Greystone) are described on page 4 of the Maximum Security Inmates Rules. The former version of these rules was approved by the U.S. District Court in **Brenneman v. Madigan,** and the revisions have the effect of liberalizing the previously-approved rules. Supplemental to the rules themselves are the directions given to the Sheriff's Department personnel who are charged with enforcing the rules. A true and correct copy of those directions is set forth in the memorandum dated June 12, 1975, a copy of which is attached hereto, marked Exhibit "E" and by this reference incorporated herein as if set forth at length. Therein it is stated, for example, that "mail shall not be read; it will only be inspected for contraband."

b. **Visitation.** Inmates also have access to the public and to the media through visitation. The attached Rules

(Exhibits A, B, C, and D) discuss visitation. With respect to maximum security inmates, for example, the visitation rules are set forth on pages 3 and 4 of those rules. For unsentenced inmates, in addition to visiting on Sundays from 11:30 a.m. to 3:30 p.m. (and not 2:30 as indicated in the written rules), visiting is permitted on Tuesdays, Wednesdays, and Thursdays, from 6:00 p.m. to 8:00 p.m. That visiting schedule was specifically approved by this court in **Brenneman v. Madigan** in an order filed on October 30, 1972, said order specifically providing that:

> No greater number of hours and days of visiting than as are described [above] shall be required of defendants provided, however, that nothing in this Order shall be construed as indicating that, in defendant's proposed new jail facility, the days and hours of visiting to be made available for pre-trial detainees should not be established and maintained at the highest level consistent with a reasonable operation of the institution.

c. **Interviews with specific inmates.** Any media representative — or anyone else, for that matter — may interview any pre-trial detainee, upon first obtaining the written consent of the detainee, his attorney, the district attorney, and the court.

d. **Public tours.** As is indicated in defendant's Answer to the Complaint on file herein, monthly tours for the public have been instituted. Approval by the Board of Supervisors of the County of Alameda for this program was obtained on July 8, 1975. Reference is made to that Answer, and to the exhibits thereto, for a description of the public tours. An article concerning the public tours was published in the San Francisco Chronicle on July 9, 1975, and a true and correct copy of the article is attached hereto, marked Exhibit "F",

and is by this reference incorporated herein as if set forth at length. There is attached marked Exhibit "G" a true and correct copy of the Board of Supervisors resolution approving the public tours.

Dated: July 10, 1975.

/s/ THOMAS L. HOUCHINS
THOMAS L. HOUCHINS

(JURAT OMITTED IN PRINTING)

EXHIBIT A

SHERIFF'S DEPARTMENT

ALAMEDA COUNTY — CALIFORNIA
FRANK I. MADIGAN, SHERIFF

RULES & INFORMATION
FOR MINIMUM SECURITY
(OR COMPOUND) INMATES

1-25-74
(Rev. 6/75)
SANTA RITA REHABILITATION CENTER

The following rules and information are intended to aid in the proper running of Santa Rita and to inform you of what is expected of you and available to you while you are in the custody of the Sheriff of Alameda County. All inmates are expected to read and observe the rules set down on the following pages.

You are reminded that all laws of the State of California and all ordinances of the County of Alameda relative to criminal behavior are fully in effect while you are at this facility. Any violations will result in criminal prosecution.

You are further advised that any violations of the rules or regulations of this institution will result in disciplinary action being taken against you.

IMPORTANT NOTICE

Escape from the Alameda County Jail or the Santa Rita Rehabilitation Center is a Felony and you will be charged under section 4532 of the Penal Code of California. Penalty for escape is one (1) to ten (10) years in the State Prison. All violators will be prosecuted.

GENERAL RULES FOR INMATE CONDUCT:

1. Your person and property is subject to search at any time. Your personal property in barracks can be searched at any time, whether or not you are present. All unauthorized items are contraband and will be confiscated.

2. Be courteous toward fellow inmates and staff. Address the staff by their title of the prefix Mr., Mrs., or Miss and their last name.

3. Profane and vulgar language is prohibited.

4. Personal cleanliness, of self, living space, bunks and lockers is required. Inmates are not to litter. All trash is to be thrown in trash recepticals.

5. No visiting between barracks or compounds without an officer's permission.

6. Wear you Ident-a-Band at all times. If it needs replacement, contact an officer immediately. It is used to identify you for Commissary, Visiting, Mail and movement from place to place.

7. GAMBLING in any form is prohibited.

8. SMOKING IS PROHIBITED in the following areas:

a. Messhall, either while inside or while in line enroute to meals.

b. Administration Offices.

c. In areas where flammable materials, gasoline-oil, hay, etc., are stored.

d. While lying on your bunk. You may smoke while seated on your bunk.

e. On County vehicles.

f. During counts.

9. Certain areas are Out of Bounds or restricted (inmates are not allowed in these areas without expressed permission from an Officer or employee). OUT OF BOUNDS or RESTRICTED areas are:

a. The Women's Quarters and fence area outside it are OUT OF BOUNDS to male inmates.

1. Male inmates are not allowed to communicate with female inmates.

2. Messages are not be be passed into or out of the Women's Quarters.

b The Little Greystone Barracks in the compound is a RESTRICTED area.

c. Compound Eight is a RESTRICTED area for inmates except Immigration and Weekenders.

d. The Messhall is RESTRICTED except during meal hours or duty assignment.

e. Officer's Quarters is OUT OF BOUNDS.

f. Greystone is a RESTRICTED area.

g. All shop areas and the Health Department are RESTRICTED areas.

h. The Administration Building and the Front Office are OUT OF BOUNDS.

i. The Booking Office and Detail Office are RESTRICTED areas.

10. No fires may be kindled for any purpose. Violators will be prosecuted under the California Penal Code. Fire equipment is for your protection, it is to be used in case of fire only, and is not to be tampered with.

11. Defacing or destruction of County property, clothing, bedding and supplies is prohibited.

12. Pin-ups, girlie pictures and drawings are prohibited. You may have 3 pictures of family or friends in the barracks. Pictures are not to be displayed on the walls or outsides of lockers.

13. Fighting is prohibited.

14. You may have in your possession or in the barracks, only the amount of medication approved by the Medical Department.

15. You may have only current newspapers (not over 3 days old) and approved books and magazines in your possession or in the barracks. Any excess amount of paper, magazines or other flammable items, constitutes a fire hazard.

16. No inmate is to engage in any action which would endanger the safety of an employee or another inmate, violate the security of the jail or interfere with the proper running of the jail.

ANNOUNCEMENTS AND CONDUCT DURING MOVEMENT:

1. Upon the announcement of RECALL, all inmates are to return **immediately** to their proper barracks, and stay off the Compound street and patios.

2. Upon the announcement of COUNT, inmates will stand at the foot of their own bunks until the Officer has finished his count of their barracks. During the count there will be no talking, smoking, or moving about. All inmates will remain inside their barracks until count is announced clear over the PA system. Inmates may remain in their bunks during counts after lights out and before reveille.

3. The Barracks Meal Order will be announced and rotated daily. The Count will be announced as being clear. Inmates will then remain behind their barracks gate until called to the Messhall by a Compound Officer. Upon being called (by barracks), inmates will proceed to the Messhall in **SINGLE FILE**, orderly line. Complete jail issue (shirt, pants, shoes) must be worn during meals. No hats are to be worn in the Messhall.

4. Reveille will be announced and the barracks radio turned on. Inmates will then get up, get dressed, make up their bunks and stand by for the morning count.

5. Upon announcement of the work call (Monday thru Friday) inmates will proceed immediately to their assigned jobs.

6. Other announcements will be made as needed for movies or special events.

7. Inmates should be attentive to announcements made over the PA and follow any instructions given. Inmates names are often called over the PA for various reasons, and inmates should listen for these announcements and follow any instructions promptly.

8. When proceeding on the Compound street for any reason, inmates will walk between the gutters and the painted lines on either side.

PERSONAL HYGIENE:

1. Shower rooms, shaving rooms, barracks washrooms and lavatories are provided for your use. Help keep them clean, throw trash in containers.

2. A barber shop is located on the compound. Inmate barbers are not to charge for services. Keep hair, mustaches and beards neat.

3. Take a bath at least twice a week. Wash underclothing regularly or exchange for clean issue.

4. Inmates assigned to the Messhall will be especially careful of their personal hygiene; that is, clean hands, fingernails, clothing etc., and will follow special health requirements as set down by the Messhall staff, with regards to food preparation, food service and cleanliness of equipment.

CLOTHING, BEDDING AND PERSONAL PROPERTY:

1. Appropriate jail clothing, footwear, linen, blankets and towels will be issued to you. Only issued items of outer clothing are permitted. Headbands, hairnets, or makeshift headgear are prohibited.

2. You may retain your own underwear, socks and handkerchiefs. No private sweatshirts or colored T-shirts are allowed. Visitors may leave underwear, socks and handkerchiefs during Sunday visiting only.

3. Clothing will be worn properly. Those who issued shirts are to keep them buttoned and tucked in at all times when out of their barracks. Sweatshirts are not to be worn over issued shirts.

4. You may have only one set of clothing, as issued, in your possession at a time. Replacement of torn, dirty or

wornout clothing can be made at the Detail Office after 3:15 p.m. on weekdays. After receiving clean clothing the soiled items are to be placed in the carts provided for return to the laundry.

5. Trading of clothing, and/or property, between inmates is prohibited.

6. Towels may be draped over the foot of the bunk for drying.

7. Each inmates' sleeping area in the barracks will consist of his bunk and the issued locker. No make-shift tables or shelves will be allowed. Each inmate will have in his possession only one standard issue of bedding (1 set of blankets, sheets, 1 pillow, 1 pillow cover, 1 mattress and 1 towel) all other items will be confiscated.

MEALS — MESSHALL RULES:

1. At the Messhall, pick up mess gear and move in single file to the steam tables. Accept only the food you will eat. When served, proceed to a table and be seated as indicated by an Officer. All stragglers to the Messhall will eat last.

2. When you have finished eating, take the mess gear to the scullery area and deposit it as directed. Leave the Messhall immediately; no loitering. No food is to be taken out of the Messhall, except fresh fruit.

3. Special passes are issued to those inmates who must eat at other than regular hours. They will be inspected, carry them at all times.

WORK ASSIGNMENTS:

1. Physically able inmates will be assigned to a work detail after sentencing. Assignments are based on experience, skills, job availability, aptitude needs of the jail and jail security. Job assignments are subject to change at any time.

2. You are required to report to your work detail promptly and to cooperate with the work program. Malingerers will lose "Work Time" credits.

3. Do not leave your work detail without permission of the officer or employee in charge.

4. Tools, equipment, vehicles, animals, produce or other items that are used in the performance of your job are to be cared for in a proper manner.

5. Obey all safety precautions around mechanical equipment.

6. Vehicle rules must be obeyed for your safety:

a. Enter vehicles by doors or tailgates only; leave the same way.

b. Once in the vehicle sit down and remain orderly; keep all parts of the body inside.

c. Do not enter or drive any vehicle or operate any mechanical equipment unless authorized by an officer or employee.

7. Inmates assigned to the Messhall are reminded of their personal hygiene practices and are to follow the direction of the Mess Officer in matters which are unique to their jobs.

COMMISSARY:

1. A commisary is maintained for your convenience. The price of your purchase is charged against your account. Any questions with reference to the cash balance noted on your account should be brought to the Commissary Officer's attention immediately.

2. Inmates with less than $1.00 (one dollar) on their account may draw "Free Line", tobacco and other necessities.

3. Store hours are posted for sentenced inmates.

4. When in Commissary line, remain in single file. Line jumping will not be tolerated. Noise is to be kept to a minimum.

5. You will be required to identify yourself, by the Ident-a-Band, when drawing commissary.

6. Panhandling or threats, or the use of force to get someone else's commissary will not be tolerated.

7. Commissary privileges can be revoked for violation of Inmates Rules.

CHAPLAIN:

Santa Rita has a full time Chaplain. He is available five days a week for consultation and special services. He conducts Protestant services and arranges church services for other denominations. Check the schedules posted at the Chapel.

SOCIAL SERVICES OFFICER:

1. Catalogs, applications, and/or financial aid information for Bay Area community state colleges, adults schools; information on drug rehabilitation programs, vocational (job), educational, and personal counseling, are available.
2. Social Services Officers may make telephone contact with relatives, community agencies, employers, etc., to assist inmates with vocational, educational or personal problems.
3. The Social Service Officer will also assist inmates with applications for the Work Furlough program and the Sheriff's Parole.
4. The Social Services Office is located at the center of the building housing the Project Office and the Officers Quarters. No appointment is necessary. Inmates assigned to rolling crews must secure approval of their supervisor.

EDUCATIONAL PROGRAM:

1. An educational program is sponsored by the Sheriff through the Social Service Office.
   a. Classes are open in elementary, high school and certain vocational subjects. Check at the Social Service Office for schedule of classes and registration.
2. A library is maintained for your use. In addition, the Alameda County Bookmobile makes regular visits to Santa Rita.
3. Books and educational materials for correspondence courses will not be allowed unless approved by the Social Service Officer. Submit a request slip listing the items needed and their source. Texts and supplies must be mailed from an accredited bookstore after approval. The Sheriff assumes no liability for their loss.

RECREATIONAL PROGRAMS:

Any questions concerning recreational activities should be directed to the recreational director.

1. Games are placed in the various barracks and day rooms for your use. Athletic gear is available for use in the compounds, on the athletic field, and in the gym.
2. Whenever possible, outside groups will be brought in to provide entertainment. Good conduct during these programs is a must.
3. Movies are scheduled on weekends and holidays. Designated barracks will attend the movies when shown, listen for the announcement. You will be allowed to attend the movie only when your barracks is scheduled.
   a. At announced times, go the auditorium in single file.
   b. Take the first available seat nearest the stage.
   c. Don't throw trash on the floor.
   d. Female inmates may be in the balcony section, no attempts at conversation are to be made.
   e. In case of emergency (fire, etc.) follow the directions of the Officers.
   f. Do not move the seats around; keep the aisles open for fire exits.
   g. When the movie is over, follow the directions of the Officers.
   h. Violations of rules and regulations can result in loss of movie privileges.
4. Television programs are shown in the Auditorium during non-duty hours. Special programs, sporting events, etc., will be shown whenever possible. Do not handle the equipment.

MEDICAL SERVICES:

1. There is a doctor, a nurse, or a medical technician on duty at all times. The medical staff will make all decisions relative to medical care.
2. Emergency illnesses will be handled as they occur.
3. If you are injured at anytime, anywhere, notify an

officer or employee immediately. If you see someone in need of medical attention who cannot report it, notify a member of the staff immediately.

4. If you have any medical problem notify an officer at once so that the problem can be referred to the Medical Staff without delay.

5. Sick call is held daily, Monday through Friday.

a. If you go to sick call, maintain order while in the waiting line or treatment rooms.

b. After you have been seen by the Medical Staff, comply with their instructions.

1. If you have been given "Lay-in" or a "No Duty" slip report to the Detail Office.

2. If you illness requires close medical supervision, you may be moved to the infirmary.

3. If you are placed on medication, you will be given instructions.

6. Sick calls on weekends and holidays are held as needed. If you have a medical problem, notify an officer and follow his instructions.

7. Dental services are available. You must go through the Medical Staff at the Clinic so that you problem can be brought to the attention of the dentist, and an appointment scheduled.

8. If you require medical services not available through Alameda County facilities, you may arrange for such care by your own physician, at your own expense. Arrangements for such service must be made through the Medical Staff.

9. Medication issued to you is for your use. Inmates given medication to be carried on their person must carry a signed authorization from the Medical Staff relating to its issue date, dosage, and type of medication. The dentist will issue medication as necessary and an authorized approval slip.

10. Before you are assigned to a work detail, you will be processed through the Clinic. Let them know of any condition that would limit your ability to do certain work.

11. Inmates are not to make a practice of attending Sick Call as a reason for getting out of work.

VISITING:

1. Visiting hours are from 11:30 A.M. to 2:30 P.M. on Sunday, and at such other times as posted by special notice. If an inmate desires no visitors, he is to submit a request message directed to a Sergeant that he does not wish to have any visitors.

2. Visitors under the age of 18 years must be accompanied by an adult.

3. Persons released from State Prison or on parole cannot visit without specific approval of the Commanding Officer. Persons who have been released from Santa Rita or the Courthouse Jail within the last six months cannot visit without the approval of the Commanding Officer.

4. Visitors are to have suitable identification (as required to cash a check).

5. Inform visitors of your name and booking number as carried on the jail roster. (Someone may know you under an alias, other spelling, etc.)

6. No physical contact will be allowed between inmates and visitors.

7. Do not receive from or give anything to a visitor during the visit. If you want to release items of personal property, fill out the necessary release form (barracks trustees and the Detail Office have them) and give the complete form to an Officer at least two days before visiting.

8. Inmates will receive their visitors in the auditorium. They will wait in their barracks or barracks compound until their name is called for a visit. They will then empty their pockets of all items except a comb and handkerchief and proceed to the auditorium walking between the gutter and the painted lines. There is to be no smoking while in the auditorium.

9. When going to and from the auditorium for visiting, do not attempt to communicate with outsiders who may be waiting outside the auditorium, or entering, or leaving the auditoruim. Leave the visiting area immediately when told to do so by an officer.

10. Notify your visitors of the visiting rules and encourage

them to comply.

11. Violation of rules of conduct will result in loss of visiting privileges.

MAIL:

1. Your mailing address is:
   Your name and booking number
   P.O. Box 87
   Pleasanton, California 94566

2. All inmates may write to the Sheriff or jail officials to express any grievance. This mail will not require postage.

3. Each letter sent or received must show the name and address of the sender on the outside of the envelope.

4. Out going letters to attorneys, judges, or government officials (Federal, State, or Local) may be sealed by the inmate prior to mailing.

5. Outgoing letters, excluding those listed in #4, will not be sealed by the sender. They will be picked up daily and delivered to the Pleasanton Post Office; except on Sunday and holidays, after inspection by Sheriff's personnel.

6. All incoming mail, except that from judges, will be inspected for contraband.

7. Money should be sent to you only in the form of money orders. No checks of any kind will be cashed here. Personal checks will be returned to the sender, and other checks will be placed in the inmate's property envelope. Money orders sent must be made out as follows: Pay to the order of Sheriff's Department, Alameda County, for the account of (inmate's name and booking number).

8. Mail call is announced and handed out each evening (Monday through Friday, except holidays). Mail will be delivered only to the inmate addressee. You will be required to identify yourself at the time mail is delivered.

9. Envelopes, stamps, and writing materials are sold in the commissary. Inmates with less than $1.00 may obtain envelopes and stamps from the "Free Line" for necessary correspondence.

10. Mail directed to the probation officer may be addressed

to the Probation Office at Santa Rita and will require no postage. Such mail will be delivered by Santa Rita personnel to the Probation Office at Santa Rita for forwarding.

11. Mail will be sent and received only through regular channels. It is unlawful to send letters out of this institution, or receive letters into this instruction, in any other manner.

12. Parcels or packages sent through the mail are prohibited with the following exceptions: Legal references, textbooks, periodicals, magazines, and books that are approved as mail matter by the U.S. Postal Authorities will be accepted from publishers.

(EXHIBIT B OMITTED IN PRINTING)

EXHIBIT C

SHERIFF'S DEPARTMENT

ALAMEDA COUNTY — CALIFORNIA
FRANK I. MADIGAN, SHERIFF

RULES & INFORMATION
FOR MAXIMUM SECURITY
INMATES

1-25-74
(Rev. 6/75)
SANTA RITA REHABILITATION CENTER

The following rules and information are intended to aid in the proper running of Santa Rita and to inform you of what is expected of you and available to you while you are in the custody of the Sheriff of Alameda County. All inmates are expected to read and observe the rules set down on the following pages.

You are reminded that all laws of the State of California and all ordinances of the County of Alameda relative to

criminal behavior are fully in effect while you are at this facility. Any violations will result in criminal prosecution. You are further advised that any violations of the rules and regulations of this institution will result in disciplinary action being taken against you.

IMPORTANT NOTICE

Escape from the Alameda County Jail or the Santa Rita Rehabilitation Center is a Felony and you will be charged under section 4532 of the Penal Code of California. Penalty for escape is one (1) to ten (10) years in the State Prison. All violators will be prosecuted.

Information For Greystone Inmates

GENERAL RULES FOR INMATE CONDUCT:

1. Be courteous toward fellow inmates and staff. Address the staff by their title or the prefix Mr., Mrs., or Miss and their last name.

2. Medical personnel are available at all times. If you need medical attention or see someone in need of medical attention who cannot report it, notify an officer immediately. Sick call is held daily. Dental services are available through the medical staff.

3. All inmates entering Greystone for confinement will be strip-searched. Your person and property is subject to search at any time.

4. The following items may be kept by inmates, on their person or in their cells, except when undergoing disciplinary confinement or loss of privileges. All other items are contraband and will be confiscated:

a. Cigarettes and tobacco products; soft, non-metallic containers

b. Matches, safety type

c. Personal underwear; T-shirts must be white, shorts may be any color

d. Issue sweatshirts during winter or cold weather

e. Personal socks and handkerchiefs

f. All issued items of county clothing, towels, and bedding

g. Soap and toilet paper

h. Toothbrush and tube toothpaste

i. Commissary items approved for Greystone

j. Non-metallic pocket type combs; ("Natural" and other pointed combs are not allowed)

k. Pencils, ballpoint pens, writing paper, envelopes, stamps and legal papers pertinent to your case

l. Library magazines and periodicals not to exceed 2 at any one time

m. Approved personal books, legal books, bible, and not more than 2 library books at any one time. Not more than 5 newpapers less than 3 days old

n. Personal and business letters received while in Greystone

o. Not more than 3 wallet size photographs of relatives or friends

p. Authorized medication; accompanied by a medical slip relating to usage

q. No food, other than fruit, nuts and commissary items

5. Inmates in a disciplinary or loss of privilege status will be allowed only toothbrush, toothpaste, soap, toilet paper, towel, tobacco, books and issued County materials. Some of these items may be removed from their cell at lights-out and returned in the morning.

6. All inmates are expected to conform to acceptable standards of personal hygiene. Showers are provided in all dayrooms. Twice weekly bathing is required. Each cell is equipped with a washbasin, hot and cold water, and a flush toilet.

7. Unsentenced inmates may get a hair trim and sentenced inmates a hair cut at reasonable intervals. There is no charge. Headbands, hairnets or make-shift headgear are prohibited.

8. Commissary is sold in Greystone twice each week. Inmates with less than one dollar on their accounts can

request "Free Line." "Free Line" is limited to smoking material, writing material, stamps, toothbrush and toothpaste.

9. All inmates will wear an Ident-a-Band on a wrist showing their name and booking number. If the Ident-a-Band becomes worn out or illegible, inform an officer so that it may be replaced.

10. Clothing and linen will be exchanged at least on a weekly basis.

11. When reveille is announced and the radio is turned on, all inmates will get up, wash, make up their bunks and tidy up their cells. Inmates are allowed to lie on top of a made up bunk during the daytime.

12. Inmates not having a medical "Lay-in" will be moved to the dayrooms or exercise yard each day.

13. During movements to the dayrooms, messhalls, and the exercise yard, inmates will be moved in groups. Inmates in these groups will proceed quietly and in an orderly manner. They will not stop to visit with inmates in other cells or ask questions of officers supervising the movements. Inmates are required to remain with their assigned groups and may not mix with other groups.

14. At commissary and sick call, when inmates are being served in the dayrooms or the exercise yard, they will line up in an orderly manner, keep the noise down, and will speak to the medical personnel or commissary clerk one at a time, in their turn. It is impossible to understand and take care of an individual's needs if everyone is trying to talk at the same time. Horse play and excessive noise will not be tolerated.

15. Gambling in any form is prohibited.

16. Upon entering the messhall to eat, each inmate will be handed a tray of food, eating and drinking utensils, will proceed directly to the seat indicated by an officer. After finishing eating, all inmates will remain seated until directed by an officer to leave the messhalls.

17. The television set controls in the dayrooms are off limits for inmates. They will be turned on and off, adjusted, and fixed only by an officer or technician.

18. Defacing or writing on walls and doors are prohibited.

19. Willful damaging, mutilation or destruction of county clothing, bedding, buildings and equipment is prohibited.

20. Counts will be taken from time to time. During counts all inmates will stand up and refrain from moving about. During counts taken after lights out and before reveille in the morning inmates may remain in their bunks.

21. Noise will be kept to a minimum, particularly after lights out. Loud yelling, singing, or whistling is prohibited at all times.

22. No articles of any kind may be hung from the overhead screens in the cells or inside dayrooms.

23. Blankets, bedding or other materials may not be arranged to conceal any occupant of a cell. Bedding may not be taken to the dayrooms.

24. Standing on the sinks or toilets in the cells or dayrooms is prohibited.

25. No pictures or decorations of any kind may be affixed to the walls or doors of the cells or dayrooms.

26. Any action by an inmate which, by its nature, interferes with the proper running of the jail, jeopardizes security, or endangers the safety of an inmate or employee, is strictly prohibited.

27. Smoking in bed is prohibited. Smoking is prohibited during movements of inmates and in the messhalls.

28. No fires may be kindled in Greystone for any purpose.

29. Sex crimes will be investigated and prosecuted.

30. Inmates who believe that they are scheduled for a court appearance and have not been called for court should notify an officer.

31. No trusty, or other inmates, has any authority over inmates. The trusties, under supervision of an officer, attend to many of the inmates' daily needs. Trusties asking favors for any service rendered should be reported to an officer.

32. Inmates needing an attorney and who have not had an opportunity to contact one should notify an officer.

33. Visiting hours are from 11:30 A.M. to 2:30 P.M. on Sundays for both sentenced and unsentenced inmates. Unsentenced inmates only, will have visiting at such other times as announced. If an inmates does not desire to have

visitors, he may submit a request message directed to a Greystone Sergeant that he does not wish to have any. Persons released from State Prison or on Parole cannot visit without specific approval of the Commanding Officer. Persons who have been released from Santa Rita or the Courthouse Jail within the last six months cannot visit without the approval of the Commanding Officer. An exception is a husband-wife, both of whom were in jail at the same time. If one gets out before the other, a visit may be arranged on a special basis by request to the Commanding Officer. Such visits will not be more than twice monthly. Visitors under the age of 18 years must be accompanied by an adult.

34. Visitors may leave money, socks, underwear, and necessary clothing for court appearances, at a place provided on visiting days.

35. Visitors are to have suitable identification (as required to cash a check).

36. Inform visitors of your name and booking number as carried on the jail roster (someone may know you under an alias, other spelling, etc.)

37. Do not receive from or give anything to a visitor during the visit. If you want to release items of personal property, fill out the necessary release form (see an officer) and give the completed form to an officer at least two days before visiting.

38. Notify your visitors of the visiting rules and encourage them to comply.

39. Violation of rules of conduct can result in loss of visiting privileges.

MAIL:

1. Your mailing address is:
   Your name and booking number
   P.O. Box 87
   Pleasanton, California 94566

2. All inmates may write to the Sheriff or jail officials to express any grievance. This mail will not require postage.

3. Inmates shall have no limit on the number of letters they may send or receive, nor shall there be a limit on the number of pages in a letter:

a. Each letter must show the name and address of the sender on the outside of the envelope.

b. Outgoing letters to attorneys, judges, government officials (federal, state, or local) may be sealed by the inmate prior to mailing.

c. Outgoing letters to persons other than those listed in (b) above, shall be submitted by the inmate, unsealed. Letters will be inspected, then sealed and mailed by the Sheriff's personnel.

d. Incoming mail, except that from judges, will be opened and inspected and will be delivered to the addressee in the normal manner.

4. Money should be sent to you only in the form of money orders. No checks of any kind will be cashed here. Personal checks will be returned to the sender, and other checks will be placed in the inmate's property envelope. Money orders sent must be made out as follows: Pay to the order of Sheriff's Department, Alameda County, for the account of (inmate's name and booking number).

5. Mail will be delivered only to the inmate addressee. You will be required to identify yourself at the time mail is delivered.

6. Envelopes, stamps, and writing materials are sold in the commissary. Inmates with less than $1.00 may obtain writing materials from "Free Line" for necessary correspondence.

7. Mail directed to the probation officer may be addressed to the Probation Office at Santa Rita and will require no postage. Such mail will be delivered by Santa Rita personnel to the Probation Office for forwarding.

8. Mail will be sent and received only through regular channels. It is unlawful to send letters out of this institution, or receive letters into this institution, in any other manner.

9. Parcels or packages sent through the mail are prohibited with the following exceptions: Legal references, textbooks, periodicals, magazines, and books that are approved as mail matter by the U.S. Postal Authorities will be accepted from publishers.

CORRECTIONS SERVICES:

There is a Correction Services Officer on duty at Santa Rita seven days a week with the exception of holidays. He is available to assist inmates in the filing of applications for Sheriff's Parole, Work Furlough, employment, and schooling. The Corrections Services Officer will also counsel and assist inmates with personal problems that may arise while they are in custody.

(EXHIBIT D OMITTED IN PRINTING)

EXHIBIT E

ALAMEDA COUNTY SHERIFF'S DEPARTMENT

From: H.T. Garrigan, Chief Date: June 12, 1975
To: COMMANDING OFFICERS
CONCERNED PERSONNEL

Subject: SPECIAL ORDER 75-2 (Detention & Corrections Division) MAIL REGULATIONS FOR INMATES

Effective immediately, the following rules for inmate mail handling will prevail:

1. This order supersedes all previous orders.

2. Mail shall not be read; it will only be inspected for contraband.

3. All inmates may write to the Sheriff or jail officials. This mail will not require postage.

4. Money should be sent to inmates only in the form of money orders. If cash is received through the mail, it will be accepted, properly receipted, and posted to the inmate's account. The receipt will be delivered to the inmate. Personal checks will be returned to the sender with a copy of Form PD

177. Other checks will be receipted on a Property Receipt From PD 112 and the check with the 2nd and 3rd copy of the receipt will be placed in the inmate's property envelope. The original of the receipt form will be delivered to the inmate with his mail. No checks are to be cashed at the detention facility.

5. Mail is to be delivered to the addressee. Inmates must identify themselves before mail is delivered.

6. Envelopes, stamps and writing materials may be purchased at Commissary. Inmates with less than $1.00 may obtain writing materials from "Free Line."

7. Mail directed to a probation officer may be addressed to the Probation Office at Santa Rita and will require no postage. This mail will be delivered to the Probation Office at Santa Rita for forwarding.

8. With the exception of legal references, textbooks, periodicals, magazines, and books that are approved by U.S. Postal Authorities for movement through the mail, packages and parcels are prohibited. Any packages that are received will be opened and the contents listed on Property Receipt From PD 112. The contents will be stored. The original of the receipt will be delivered to the inmate with his mail. All packages containing perishable items will be returned to the sender if acceptable by the Post Office. If items are not acceptable, the items will be disposed of as directed by the Watch Commander.

9. Letters received from attorneys, government officials (federal, state, or local) must be opened and inspected in the presence of the inmate. Mail from judges should not be opened or inspected. If the letter is not marked to indicate the sender, it will be opened and inspected. If it is from a judge, the envelope should be retained.

A. All other mail received for inmates will be opened, inspected for contraband; cash, checks, or money orders removed for processing, and the letter delivered without unnecessary delay. The letter will be stamped "inspected". The inmate does not need to be present during inspection or opening of this mail.

10. Outgoing letters to judges, attorneys, elected officials (federal, state, or local), attorney generals, the Sheriff, jail officials, or a probation officer may be sealed by the inmate prior to mailing.

A. All other outgoing letters shall be **inspected** for contraband, stamped "inspected", and mailed through normal channels.

11. There will be **no limit** on the number of letters an inmate may send or receive.

12. There will be **no limit** on the number of pages in each letter.

13. Each letter must show the name and address of the inmate on the outside of the envelope.

14. Mail is to be sent and received through regular channels only. No Deputy or other employee is to accept incoming mail for any inmate or outgoing mail from any inmate or other person except through regular channels.

(EXHIBIT F OMITTED IN PRINTING)

EXHIBIT G

THE BOARD OF SUPERVISORS
OF THE COUNTY OF ALAMEDA,
STATE OF CALFORNIA

THE FOLLOWING RESOLUTION WAS ADOPTED:
NUMBER 161935

APPROVE PILOT PROGRAM — SANTA RITA
REHABILITATION CENTER TOURS

WHEREAS, this Board of Supervisors is in receipt of the following communication from the Alameda County Sheriff:

(Letter Omitted in Printing. See Appendix, pp. 25-27)

NOW, THEREFORE, BE IT RESOLVED that this Board of Supervisors does hereby approve the implementation of a six-month pilot program by the Alameda County Sheriff of guided three-hour tours through all major facilities at the Santa Rita Rehabilitation Center, Pleasanton, California, on a monthly basis, to be scheduled on the evening of the second Monday of each month, beginning with July 14, 1975, such program to be funded as set forth in the foregoing communication; and

BE IT FURTHER RESOLVED that the guided tours shall be subject to the following regulations:

1. Each tour shall be limited to a maximum of 25 persons.

2. Arrangements must be made in advance with the Sheriff Department by calling 828-5400, Extension 67, between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday.

3. All persons must be at least 18 years of age and may be subject to search prior to entering the facility.

4. No cameras or tape recorders shall be allowed.

5. The tours shall begin promptly at 6:30 p.m. on each of the following nights: July 14, 1975, August 11, 1975, September 8, 1975, October 13, 1975, November 10, 1975 and December 8, 1975.

(CERTIFICATION OMITTED IN PRINTING)

AFFIDAVIT OF GEORGE A. MATZEK

George A. Matzek, being first duly sworn, deposes and says:

1. That he is a Lieutenant in the Sheriff's Department, County of Alameda, State of California.

2. That pursuant to instructions from the Sheriff, your affiant has interviewed the officials of the State of California's prison at San Quentin with respect to public tours and public access to that facility, and has been told the following:

Currently, San Quentin conducts 24 dinner tours for the public each year, which are intended primarily for organized groups such as recognized citizens groups, universities, churches, law students, bar associations, and law enforcement organizations. There is approximately a one-year waiting period for these dinner tours. There is no other public access (as distinguished from media access) to San Quentin. The rules for those tours, as of May, 1975, are attached hereto marked Exhibit "A", and by this reference incorporated herein as if set forth at length. It will be noted that no cameras are permitted. The specific instructions for the tour for June 14, 1975, are attached marked Exhibit "B", and by this reference incorporated herein as if set forth at length. It will be noted that there is no contact with inmates, as the inmates are moved until the visitors have cleared the various areas.

Dated: July 9, 1975

GEORGE A. MATZEK
GEORGE A. MATZEK

(JURAT OMITTED IN PRINTING)

May, 1975

EXHIBIT A

CALIFORNIA STATE PRISON
SAN QUENTIN

The following will apply to dinner-tour visits:

1. These visits are held on Saturday evenings. Visit consists of a tour, dinner and inmate entertainment. The person responsible for each group must arrive at the institution by 4:45 p.m., the balance of the group not later than 5:15 p.m. The group leader will be required to identify each member of his/her group, and each member of the group will be screened by means of a metal detector, and handbags may be subjected to search. Visitors are urged to have as few metal objects in their possession as possible.

2. Charge for the dinner is $4.00 per person. When a date has been set for your visit a form will be sent to you, which is to be returned with one check (certified or cashier's check) in payment for the total group. PAYMENT IS TO BE MADE ONE MONTH PRIOR TO THE VISIT. If, for institutional reasons the visit is cancelled, refund will be made.

3. The tour is long, and elderly or infirm persons should be discouraged from participating in these visits.

4. The State of California will not be responsible for any injuries sustained in the course of the visit.

5. Hostages will not be recognized for bargaining purposes.

6. Visitors may arrange transportation either in buses or private cars; in either case, parking will be in our employee parking lot to which you will be directed by the entrance-gate officer.

7. Handicraft articles will be for sale, but checks are not acceptable.

8. No tipping is permitted in the institution, and contacts with inmates likewise is not permitted.

9. No one who has been convicted of a felony may visit.

10. Visitors may not bring cameras, weapons, including pocketknives, narcotics or alcoholic beverages into the institution, nor will anyone under the influence of alcohol or narcotics be admitted.

11. Visitors are expected to be appropriately attired. Men visitors will not be admitted if wearing blue or black jeans.

12. Although approval is given to your visit, the institution reserves the right to refuse entry to the prison, if, in the judgment of the person responsible for the tour there is good and sufficient reason for such refusal.

13. These programs are for adults; but under no circumstances will anyone under the age of 16 years be admitted.

R. M. REES

R.M. REES,
Warden

EXHIBIT B

INTER-DEPARTMENTAL COMMUNICATION
CALIFORNIA STATE PRISON AT SAN QUENTIN

Date: May 16, 1975

To: ASSOCIATE WARDEN CUSTODY

From: H.G. WATKINS
CORRECTIONAL LIEUTENANT
SECOND WATCH COMMANDER

Subject: DINNER-TOUR
SATURDAY, JUNE 14, 1975

On the above date, approximately 200 men and women will arrive at the institution at about 6:00 p.m. They are to be escorted on a tour, served dinner in the south dining room, and provided a program of inmate entertainment.

The visiting group will assemble at the inspectoscope gate where they will be passed through the metal detector. At approximately 6:20 p.m., they will be escorted by the Officer of the Day and two (2) assigned escort officers to the front witness room of the gas chamber where they will be met by the Outside Sergeant, who will stamp them with flourescent ink and count them in. They will then pass from the chamber through the rear rooms and into and through the North Block Rotunda where they will be met by the Watch Sergeant and counted into the North Block. The tour will traverse the yard side of the first tier exiting via the west yard door. All inmates housed on the three bottom tiers of the housing unit will be moved to the north side of the block until the visitors have cleared the building.

Upon exiting the North Housing Unit, the visitors will pass through the truck gate, past the Yard Office to the Catholic Chapel. The group will walk through the Catholic Chapel and proceed to the Protestant chapel where a previously

prepared program of not more than one-half (½) hour in length will then be presented under the direction of the band instructor. At the conclusion of this program the officer of the day will hold a question and answer session.

The group will then proceed down the roadway past the dungeon, entering the industrial area through the gate under Wallpost "8". An officer will count the group into the area. It will be necessary to have another officer present at the gate to unlock and lock the gate and doors to the furniture factory and maintenance vocational building. The group will then pass into the furniture factory through the south door, tour the factory and exit through the truck door at the west end of the factory.

The group will then proceed via the roadway around the south end of the old navy building, through the double wire gate to the east door of the maintenance vocational building, passing through that building and exiting from the south truck delivery door. They will then proceed to the area of #6 wall where they will be counted out of the industrial area. It will be necessary for an officer to be present to unlock and lock the gate and count the group. From there the group will continue to the vocational landscape area, from the landscape area the group will proceed on the roadway passing the laundry and continue to the gymnasium, entering the north west door and exiting the main door. The group will proceed up the kitchen ramp into the kitchen yard. All inmates will be removed from the kitchen and kitchen yard area. The West Block officer will maintain security at the West Block yard gate.

They will then proceed through the kitchen to the South Dining Room. They will be conducted down the center aisle of section #4, across the South end of section #3 and conducted into the serving lines of that section, where they will be served a previously prepared menu. At the conclusion of the dinner the group will proceed from the south dining hall through the kitchen to the north dining hall, (multi-purpose room), then out the north door of the dining hall to

the main yard, through the truck gate past the Yard Office and leave the walled area via the Pedestrian Gally Port gate, being again counted and having their hands flouresced.

H.G. WATKINS

H.G. WATKINS,
Correctional Lieutenant -
Second Watch Commander

(CARBON COPIES OMITTED IN PRINTING)

(DECLARATION OF SERVICE
OMITTED IN PRINTING)

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

AFFIDAVIT OF COUNSEL
REGARDING AVAILABILITY
OF TOURS

STATE OF CALIFORNIA }
} ss.
COUNTY OF SAN FRANCISCO }

WILLIAM BENNET TURNER, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and an attorney for plaintiffs in this action.

2. On July 16, 1975, I telephoned the number stated in the Sheriff's press release for reservations for the guided tours, and asked whether any tours were available for the balance of this year. The person handling this matter in the Sheriff's office informed me that all of the tours were

completely filled for the rest of the year and that they had been filled since July 14. The person suggested that I might try calling back around November to see whether any further tours would be scheduled, but she doubted whether any such tours would be scheduled.

I inquired what kinds of people were filling the tours and was informed that ordinary citizens were taking most of the places.

WILLIAM BENNETT TURNER

WILLIAM BENNETT TURNER

(JURAT OMITTED IN PRINTING)

IN THE UNITED STATED DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

SECOND AFFIDAVIT OF
MELVIN S. WAX

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

MELVIN S. WAX, being duly sworn, deposes and says:

1. I am the Anchorman for the Newsroom program on KQED, Channel 9. I have been attempting to gain access to the Alameda County jail facilities at Santa Rita since March, 1975, for the purpose of following a developing news story described in my previous affidavit in this action.

2. On July 8, 1975, I received a telephone message from William Turner, the attorney for plaintiffs in this case, stating that a tour would be held at Santa Rita on July 14, and suggested that I telephone a certain number and sign up for the tour if I wished to go. On the morning of July 9, 1975, I called and made a reservation for the tour.

3. On July 14, 1975, I went to Santa Rita for the guided tour. About 25 persons were on the tour. At Santa Rita I met other television newsmen whom I know personally, from Channel 5 and Channel 7. They had their cameras with them that were not allowed into Santa Rita.

4. At the outset of the tour, the group was given the "ground rules". We were admonished that we could not talk to any inmates at all. We were also admonished that we could not have cameras and tape recorders with us.

5. The group was accompanied by about 12 deputies and staff persons. The tour was obviously well prepared from a public relations point of view.

6. The tour went through most, but not all, of the Santa Rita facilities. One of the facilities not included on the tour was "Little Greystone". We at KQED had received information that this medium security facility had been the site of violence and allegedly poor conditions, but we were not able to see the facility at all. We were able to see the "Big Greystone" cells. However, there were no prisoners in the cells and thus an element of realism was lacking.

7. We were offered still photographs of various facilities for purchase at $2 each. Comparing the photographs (I purchased 10 of them) with the actual facilities, I found that the photographs were very sterile and unrealistic. The pictures did not fairly and accurately represent the reality of the facilities. For example, in the picture of a Greystone cell, the open grating and catwalk over the cell are not shown at all in the photograph. In reality, prisoners in such cells have no privacy at all because the guards view them through the grating from the catwalk above; but this does not appear from the photograph. Similarly, the photograph of the day room at the "Big Greystone", while showing a television set, does not show the television monitors that keep the inmates under constant surveillance; nor does it show the open toilets.

8. Based on my experience as a journalist and a television reporter, it is my opinion that the tours provided by the Sheriff for the public and press are inadequate to meet the need to gather and accurately report the news regarding Santa Rita. The following are the principal problems:

(a) The tours are completely guided. Thus, we were able to see only what the deputies and staff allowed us to see. As pointed out in my previous affidavit in this action, other jails and prisons have permitted considerably more freedom for reporters to view and investigate conditions in the various facilities. A guided tour is in my opinion inconsistent with the responsibilities of the inquiring press.

(b) Because we were admonished not to speak to any prisoners, we were completely unable to learn the "other side" of what the deputies and staff were telling us. In fact, we were not allowed to get very close to any prisoners and had no opportunity even to see them in their normal living conditions, at least in Greystone.

(c) The prohibition against having cameras and tape recorders discriminates against reporters for television and radio. Print journalists were allowed to bring their notebooks and pencils — all the tools of their trade — but television and radio journalists were deprived of their necessary tools. Moreover, as noted above, the photographs provided by the jail did not fairly and accurately represent the reality of conditions at Santa Rita. Finally, KQED has, as set forth in my previous affidavit in this case, frequently used cameras — both television and still — in jails and prisons in the Bay Area, without any security problem at all.

(d) The fact that the guided tours are on a regular schedule, limited to once a month, and the fact that reporters are required to sign up perhaps months in advance makes it impossible for reporters to follow developing news stories. For example, this case began because KQED was attempting to follow up a story of suicide and alleged poor

conditions at Santa Rita in March. Obviously, news stories will not coincide with the schedule of tours provided by the Sheriff. But no other access is being offered to the press.

MELVIN S. WAX

MELVIN S. WAX

(JURAT OMITTED IN PRINTING)

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

AFFIDAVIT

STATE OF CALIFORNIA }
COUNTY OF ALAMEDA } ss.

BRUCE HENDERSON, being duly sworn, deposes and says:

1. I am a reporter for The Independent, a newspaper published three times weekly. I have previously made an affidavit in this action, dated June 10, 1975, in support of plaintiffs' motion for a preliminary injunction.

2. At about noon on July 10, 1975, I telephoned the office of the Sheriff of Alameda County, asked for the extension listed on the Sheriff's press release regarding public tours of Santa Rita, and inquired about signing up for the forthcoming tour on July 14. I was informed that the tour for July 14 was completely booked. I was also informed that the tour for August 11 was completely booked. I was able to sign up for the tour of September 8, but I was told that the only reason I was able to get on that tour was because there had been cancellations.

3. As a member of the working press, I can state that the Sheriff's requirement that reporters sign up months in advance for guided tours of jail facilities clearly handicaps the ability of the press accurately and fully to report on jail conditions and, in particular, to follow developing stories at the jail.

BRUCE HENDERSON

BRUCE HENDERSON

(JURAT OMITTED IN PRINTING)

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING(

AFFIDAVIT OF
WILLIAM SCHECHNER

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

WILLIAM SCHECHNER, being duly sworn, deposes and says:

1. I am a reporter for Newsroom, the regular daily news program presented by KQED, Inc. on Channel 9 in San Francisco. In my capacity as news reporter, I have frequently done stories on jails and prisons in the San Francisco Bay Area. On numerous occasions I have done such stories on location in the jails and prisons, and I have interviewed both officials and inmates.

2. On July 18, 1975, I was assigned to do a news story dealing with the recommendation by the State Bar of California that San Quentin Prison be closed. At about 11

a.m. on July 18, I telephoned San Quentin and spoke with the official who was acting as public information officer on that day. I inquired whether I and a cameraman could come to San Quentin, film conditions there and interview the warden. The official stated that this would be "hard to arrange" because it would be necessary to find officers to escort us. However, the official called back in about 45 minutes and stated that it had been arranged.

3. Later in the day on July 18, I went to San Quentin with a cameraman who carried a 16mm sound camera. Also present were reporter Tim Findley and a television cameraman from Channel 7. We inspected several facilities in the San Quentin complex, and took live shots of the facilities, prisoners in the main exercise yard, etc. To my knowledge, there were no special security precautions and no security problems were created by our presence. On the same day, we did an interview with Warden Rees at San Quentin regarding conditions there. The story was presented on the Newsroom program the same evening.

4. In my opinion, based on my experience as a television news reporter, the ability to present film of actual conditions at San Quentin significantly enhanced my ability to convey to the public, on the news program, the actual conditions at San Quentin. To have covered this and similar prison stories without film would, in my opinion, deprive the story of much of its impact as a means of communication of the information to the public.

WILLIAM SCHECHNER

WILLIAM SCHECHNER

(JURAT OMITTED IN PRINTING)

ORIGINAL FILED
NOVEMBER 20, 1975
CLERK, U. S. DIST. COURT
SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KQED, INC., et al.,
Plaintiffs,
v.
THOMAS L. HOUCHINS,
Defendant.

C-75-1257-OJC

MEMORANDUM AND ORDER
GRANTING MOTION FOR
PRELIMINARY INJUNCTION

On June 17, 1975 plaintiffs KQED and two local branches of the National Association for the Advancement of Colored People filed a civil rights complaint against the Sheriff of Alameda County, alleging deprivation of First and Fourteenth Amendment rights by virtue of defendant's exclusion of KQED news personnel from the Alameda County Jail at Santa Rita. Plaintiffs concurrently filed a motion for preliminary injunction. At a conference in chambers the Court indicated an intention to issue a preliminary injunction and urged the parties to arrive at mutually agreeable terms. Upon their failure to do so, an evidentiary hearing was held. Based upon testimony taken at the hearing and presentation of a substantial body of documentary evidence, today the Court grants injunctive relief.

A summary of the background of this case facilitates understanding of the Court's rationale for granting such relief. The complaint alleged that KQED, as a local

non-profit, publicly-supported corporation engaged in educational television and radio broadcasting, has a long-standing concern with prisons and jails in the San Francisco Bay Area and has regularly reported on newsworthy events at such institutions. On March 31, 1975 KQED's Newsroom program reported the suicide of an inmate in the Greystone portion of Santa Rita, together with certain allegations made by a Santa Rita psychiatrist as to jail conditions. Newsroom's anchorman requested permission of Sheriff Houchins to inspect the Greystone facility and was refused on grounds of "policy". The complaint futher alleged that such refusal was arbitrary and served no legitimate public interest. Plaintiffs sought an order enjoining defendant from excluding KQED from covering newsworthy events at Santa Rita, including the Greystone portion of the jail.

As of July 14, 1975 the Sheriff began implementation of a program of monthly public tours of Santa Rita, with reservations on a first come, first served basis. Ground rules for the tours included a prohibition of any conversation with inmates and a ban on cameras and tape recorders. In opposing the motion for preliminary injunction defendant has contended that the public tours, together with the inmate's mail and visiting privileges, afford adequate media access.

In so contending, defendant has placed great reliance on dictum from **Pell v. Procunier**, 417 U.S. 817, 834 (1974) to the effect that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." In **Pell** the Supreme Court upheld a California State Prison regulation prohibiting interviews with individual inmates specifically designated by representatives of the press. The Court found a substantial government interest in curtailing the practice of concentrating attention on a small number of inmates who thereby had become "public figures" within the prison and the source of severe disciplinary problems. However, the Court carefully noted that the subject regulation was not designed to frustrate media investigation and reporting of prison conditions and

that the media has access not only to a program of public tours but also to interviews of inmates selected at random — precisely the access sought by plaintiffs in this case. Therefore, this Court reads **Pell** as standing for the proposition that a prison or jail administrator may curtail media access upon a showing of past resultant disruption or present institutional tensions. Defendant has not made such a showing in this case.

Defendant's presentation at the evidentiary hearing focused on the program of public tours, tracing the tours' itinerary and introducing photographs of the jail which are offered for sale at the tours' conclusion. There was testimony that the tour groups, which are limited to twenty-five persons, include people from all walks of life. Sheriff Houchins admitted that funding by the Board of Supervisors has not been secured for the tours beyond this December, although he intends to urge continued funding of an expanded program. Plaintiffs argued, however, that all tours were completely booked shortly after their announcement and thus KQED presently has no access to the jail. Moreover, plaintiffs' witnesses stressed the inadequacy of the tours for media purposes because of the lack of opportunity to photograph conditions, interview inmates and cover newsworthy events as they occur. As developed at the hearing, not only do the public tours fail to enter certain areas of the jail, but the photographs offered for sale omit certain of the jail's characteristics, such as catwalks located above the cells.

Inadequacy of the present Santa Rita press policy seems more apparent in view of the testimony of San Francisco County Sheriff Richard Hongisto and San Quentin's Public Information Officer William Merkle. Sheriff Hongisto permits media interviews of inmates at the four jails under his jurisdiction and has not experienced any resultant disruption. Mr. Merkle testified that San Quentin inmates are interviewed by the media with no security or prison administration problems. Their testimony indicates that a more flexible press policy at Santa Rita is both desirable and attainable.

Sheriff Houchins admitted that because Santa Rita has never experimented with a more liberal press policy than that presently in existence, there is no record of press disturbances. Furthermore, the Sheriff has no recollection of hearing of any disruption caused by the media at other penal institutions. Nevertheless Sheriff Houchins stated that he feared that invasion of inmates' privacy, creation of jail "celebrities," and threats to jail security would result from a more liberal press policy. While such fears are not groundless, convincing testimony was offered that such fears can be substantially allayed.

As to the inmates' privacy, the media representatives commonly obtain written consent from those inmates who are interviewed and/or photographed, and coverage of inmates is never provided without their full agreement. As to pre-trial detainees who could be harmed by pre-trial publicity, consent can be obtained not only from such inmates but also from their counsel. Jail "celebrities" are not likely to emerge as a result of a random interview policy. Regarding jail security, any cameras and equipment brought into the jail can be searched. While Sheriff Houchins expressed concern that photographs of electronic locking devices could be enlarged and studied in order to facilite escape plans, he admitted that the inmates themselves can study and sketch the locking devices. Most importantly, there was substantial testimony to the effect that ground rules laid down by jail administrators, such as a ban on photographs of security devices, are consistently respected by the media.

Thus upon reviewing the evidence concerning the present media policy at Santa Rita, the Court finds the plaintiffs have demonstrated irreparable injury, absence of an adequate remedy at law, probability of success on the merits, a favorable public interest, and a balance of hardships which must be struck in plaintiffs' favor.

In fashioning the form of preliminary injunction, however, the Court has carefully refrained from usurping the Sheriff's role as jail administrator. By way of this Memorandum the

Court merely notes that meaningful press access to a jail includes some use of cameras and inmate interviews. The specific methods of implementing such a policy must be determined by Sheriff Houchins. Of course, should a situation arise in which jail tensions or other special circumstances make such implementation dangerous, defendant can restrict media access for the duration of such circumstances. If plaintiffs believe that a dangerous situation does not in fact exist, they are likewise free to make such a showing to the Court.

Accordingly, IT IS ORDERED that plaintiffs' motion for a preliminary injunction be, and the same is, hereby granted, subject to the restrictions set forth in the form of preliminary injunction.

Dated: November 19th, 1975.

OLIVER J. CARTER
UNITED STATES DISTRICT JUDGE

ORIGINAL FILED
NOVEMBER 20, 1975
CLERK, U. S. DIST COURT
SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KQED, INC, et al.,
Plaintiffs,
v.
THOMAS L. HOUCHINS,
Defendant.
C-75-1257-OJC

PRELIMINARY INJUNCTION

In accordance with the Memorandum and Order in the above-captioned action, and good cause appearing therefor,

IT IS HEREBY ORDERED that defendant Thomas L. Houchins, his agents, subordinates, employees and all other acting in accordance with him are preliminarily enjoined during the pendency of this action from excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein.

IT IS HEREBY FURTHER ORDERED that defendant is preliminarily enjoined from denying KQED news personnel and responsible representatives of the news media access to the Santa Rita facilities, including Greystone, at reasonable times and hours.

IT IS HEREBY FURTHER ORDERED that defendant is preliminarily enjoined from preventing KQED news personnel and responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities.

IT IS HEREBY FURTHER ORDERED that defendant may, in his discretion, deny KQED and responsible representatives of the news media access to the Santa Rita facilities for the duration of those limited periods when tensions in the jail make such media access dangerous.

Dated: November 19th, 1975.

OLIVER J. CARTER
UNITED STATES DISTRICT JUDGE

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1310.

THOMAS L. HOUCHINS,
PETITIONER,

v.

KQED, INC., ET AL.,
RESPONDENTS.

Brief in Opposition to Petition for Certiorari.

WILLIAM BENNETT TURNER,
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Table of Authorities Cited.

CASES.

OTHER AUTHORITIES.

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1310.

THOMAS L. HOUCHINS,
PETITIONER,
v.
KQED, INC., ET AL.,
RESPONDENTS.

Brief in Opposition to Petition for Certiorari.

Question Presented.

After a full evidentiary hearing, the district court granted a preliminary injunction enjoining the petitioner Sheriff from excluding respondent KQED from the Alameda County jail, for the purpose of reporting on newsworthy events there, except when exclusion is justified by jail security. Before this suit was filed, petitioner completely excluded both press and public. After suit was filed, petitioner began providing limited guided tours for the public, and the press was allowed to join the tours. The district court found that restriction to these tours unreasonably limited KQED's ability to gather and disseminate information to the public. The court also found that reasonable access by the press would not result in

harm to petitioner's interests. The question presented is whether, in these circumstances, the district court abused its discretion in granting the preliminary injunction.

Statement of the Case.

A. Proceedings in the Courts Below.

Respondents (plaintiffs in the district court) are KQED, Inc. and the Alameda and the Oakland branches of the NAACP. KQED is a non-profit corporation engaged in educational television and radio broadcasting. Publicly-supported, KQED serves the counties in the San Francisco Bay Area. It maintains a daily television news program on Channel 9, entitled "Newsroom." The members of the NAACP plaintiffs reside in Alameda County, California.

Petitioner Thomas L. Houchins is the Sheriff of Alameda County and operates the county jail. This action was filed because the Sheriff excluded KQED, as a matter of a general policy of press exclusion, from covering newsworthy events and questionable conditions at the jail.[1] Respondents moved for a preliminary injunction, seeking to obtain reasonable access to the jail. Numerous affidavits were submitted with the motion, including the affidavit of the Sheriff of San Francisco County and several experienced news reporters. The district court also held an evidentiary hearing, where Sheriff Houchins and one of his lieutenants testified. Respondents presented the testimony of the Sheriff of San Francisco, an official from San Quentin State Prison and three television news reporters,

[1] In *Brenneman* v. *Madigan*, 343 F. Supp. 128, 132-33 (N.D. Cal. 1972), the court found conditions at the jail to be "shocking and debasing," violating "basic standards of human decency," so "truly deplorable" as to constitute cruel and unusual punishment.

to the general effect that press access is freely and routinely provided in other jails and prisons in the area and that this created no problems whatever for the institutions.

On November 20, 1975, the district court granted preliminary injunctive relief, providing for reasonable access by KQED to the jail. The specific methods of implementing such access were left to the Sheriff. The Sheriff then sought and was granted a stay of the order for two weeks, to enable him to develop procedures for press access — e.g., searches of reporters and their equipment, proper identification of press representatives, instructions as to matters that could not be photographed, consent forms for interviews, etc. But instead of implementing any such procedures, the Sheriff filed notice of appeal and obtained a stay from two judges of the Ninth Circuit. The appeal was then expedited.

On November 1, 1976, the Court of Appeals unanimously affirmed the preliminary injunction issued by the district court. On December 22, 1976, the court below denied the Sheriff's petition for rehearing. No member of the entire Ninth Circuit voted to rehear the case en banc. The Court of Appeals also denied a stay pending application for a writ of certiorari, but a stay was granted by Mr. Justice Rehnquist on January 28, 1977.

B. Statement of Facts.

1. *Events leading to this suit.*

KQED's Newsroom has for many years reported regularly on newsworthy events at prisons and jails in the San Francisco Bay Area. A large number of stories have been covered on the premises of the institutions, with film, video or still camera. Included have been stories from the San Francisco, Contra Costa, San Mateo

and Santa Clara County jails and San Quentin and Soledad prisons. None of this news gathering activity has ever resulted in any jail disruption or danger of any kind.[2]

In March, 1975, KQED's Newsroom reported on a suicide of a prisoner at the Alameda County jail. KQED also reported statements by a jail psychiatrist that conditions at the facility were partly responsible for the prisoners' emotional problems. The psychiatrist was fired after he appeared on Newsroom.

In connection with this developing news story, a KQED reporter telephoned petitioner Houchins and requested permission to see the jail facility and take pictures there. The Sheriff refused, stating only that it was his "policy" not to permit any press access to the jail. This was also his response to another television reporter who sought to cover stories of alleged gang rapes and poor conditions at the jail.

Prior to the filing of this suit, the Alameda County jail was completely closed to the press even though the Sheriff had never even heard of any disruption in any jail or prison, anywhere, because of news media access.

2. *The guided tours.*

After this suit was filed, petitioner initiated a series of guided tours for the public. Each tour was limited to 25 persons. The tours were booked on a first come-first served basis. Representatives of the press were permitted to go on the tours if they signed up in time. All six tours for 1975 were completely booked within a week after they were announced in July. Thus, any reporter

[2] In covering stories on location in jails and prisons, KQED recognizes that inmates are entitled to privacy, and this is respected. As a matter of policy, KQED does not photograph or interview inmates without their consent. When appropriate or required, KQED obtains formal written consents.

who did not instantly sign up for a tour weeks or months in advance was completely barred from the jail for the balance of the year.

The guided tours took the tourists through most but not all of the jail facilities. Excluded was the notorious "Little Greystone," the scene of alleged beatings, rapes and poor conditions. Also excluded were the "disciplinary cells" in the Greystone facility.

At the outset of each tour, the officials laid down the ground rules for the tourists. It was forbidden to speak with any inmates who might be encountered. No photographs were permitted. The Sheriff offered a series of 20 photographs for sale to the tourists, at $2 each or $40 for the set. None of the photos showed inmate life; they depicted only selected portions of the plant and equipment.

The evidence before the district court demonstrated several ways in which restriction to the tours unreasonably limited KQED's ability to gather and disseminate information to the public:

(a) The tours were completely guided and were accompanied by several guards. The tourists were of course shown only what the guards allowed them to see.

(b) Because the tourists were forbidden to speak with any inmate, they could hear only what the officials told them and got only "one side of the story."

(c) The Sheriff testified that inmates must be kept "from sight and communication with the tour group." Thus, the tourists never saw normal living conditions at the jail.

(d) Reporters were not permitted to take cameras with them. The sterile and unrealistic photos proffered for

sale by petitioner gave only an artificial idea of the reality of jail life.

(e) Finally, offering only a periodic tour made it impossible for the press to cover a specific event or follow a developing news story. News events are evanescent. They do not coincide with the Sheriff's schedule of tours. Limitation to a scheduled tour made it impossible to cover an escape, a fire, a suicide or other newsworthy event as it happened.[3] It also made it possible for the jail to be "scrubbed up" specially for the tour, as was done for a press tour in the past.

3. *Press access to other jails and prisons.*

The evidence before the district court showed that other jails and prisons have no limitations of the kind imposed by petitioner Houchins, that they routinely provide free press access and that such access creates no problems whatever:

a. *San Francisco County.*

The Sheriff of San Francisco operates four jails. He routinely authorizes reporters to enter and cover stories in his jails. The reporters are permitted to bring cameras

[3] The Sheriff's petition for certiorari (p. 9) asserts that reporters may "now" have access to cover "special events, such as fires or escapes." Nothing in the record supports this assertion. If the assertion is true, it raises a question of what the Sheriff considers a "special event" and whether his practice "operates in a neutral fashion, without regard to the content of the expression." *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). For example, information about a recent riot at the jail did not leak out to the public until nearly two weeks after the event. See the Appendix to this Brief. If in fact access for spot news events does not depend on the content of the news, this should be brought to the attention of the trial court before final judgment, not asserted without record support to this Court.

and tape recorders with them. The Sheriff also permits interviews of both inmates and staff. Never, on any occasion, has this created any security problems or any disruptions.[4]

Further, the San Francisco Sheriff advanced affirmative reasons, from the point of view of a correctional administrator, for admitting the press to the jails. He testified that jails "routinely end up being places that are extraordinarily and most unnecessarily abusive to people" and that media exposure of conditions serves to enhance public awareness and thus motivate county government to provide adequate funds for more decent facilities.

b. *Other County jails.*

The evidence showed that KQED and other stations have done stories on the premises of several other county jails, without any difficulties or disruptions of any kind.

c. *San Quentin.*

San Quentin's Public Information Officer testified about the press policy of the California Department of Corrections as implemented at San Quentin. The Department recognizes a citizen's "right to know," and provides for completely open media access to the prisons, with reporters allowed to bring cameras and tape recorders, to view all areas of the prison, to talk with prisoners generally and to interview prisoners of their choice.

The official testified that arrangements for the press to come to the institution are very simple, and can be made

[4] There is no record support whatever for the petitioner's assertion that the Ninth Circuit's decision will have "national impact" because jailers everywhere will be required "to do more" and that this will be a "burden" for them. To the contrary, the only evidence of practices in other jails is that press access is freely allowed and that this creates no problems for the jailers.

the same day of the request. San Quentin has experienced no disruptions or security problems whatever because of press access. The press could of course be excluded by the warden if any security problem developed.[5]

d. *National policy*

The district court received in evidence the relevant standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals. The Commission was appointed by the LEAA to formulate standards for institutions benefitting from LEAA grants. Petitioner Houchins has received funds from LEAA, including a grant for the reconstruction of the jail, but he does not comply with the standards. Standard 2.17 flatly provides that:

> "Representatives of the media should be allowed access to all correctional facilities for reporting items of public interest consistent with the preservation of offenders' privacy."

Current Federal Bureau of Prisons policy is expressed in the Policy Statement that the Ninth Circuit appended to its opinion in this case. The Bureau encourages news media access to all prisons "to insure a better informed public." Reporters may freely use cameras, bring tape recorders, conduct interviews, etc.[6]

[5] In addition to providing open news media access, San Quentin has frequent tours for the general public, during which inmates are regularly encountered. The record here shows that the California authorities have completely abandoned the press restriction they so vigorously and successfully defended in *Pell* v. *Procunier*, 417 U.S. 817 (1974).

[6] As the Policy Statement indicates, the Bureau has completely abandoned the press restriction it so vigorously and successfully defended in *Saxbe* v. *Washington Post*, 417 U.S. 848 (1974).

4. *Experience of other news reporters.*

The evidence before the district court also included unsuccessful attempts by other news reporters to cover stories at the Alameda County jail. One wished to gain access to the jail to cover stories of reported gang rapes and suicide. He spoke personally with Sheriff Houchins, who excluded him from the jail, stating only that it was his "policy" not to allow any press entry. The reporter also tried to get on the first guided tour of the jail in July, 1975. He promptly signed up but was removed from the list when someone in the Sheriff's office decided that more members of the public and fewer members of the press would be permitted to go.

Reasons Why Certiorari Should Not Be Granted.

I. The Court should Not Exercise Its Certiorari Jurisdiction to Review an Entirely Reasonable Preliminary Injunction Granted in the Exercise of the Trial Court's Discretion.

Finding that the requirements for a preliminary injunction were met, the district court granted an order that was carefully tailored to protect the legitimate interests of all parties. The order preliminarily enjoined the Sheriff from excluding the press "as a matter of general policy." The order directed that reporters be given access "at reasonable times and hours" for the purpose of providing full and accurate news coverage of jail conditions. But, deferring to the Sheriff's administrative discretion, the court provided that "the specific methods of implementing" press access were to be "determined by Sheriff Houchins." Further, the order expressly stated that the Sheriff may "in his discretion" exclude all news

access "when tensions in the jail make such media access dangerous."

In short, the order is a model of restraint. It does not grant the press total and instant access on demand. Rather, the Sheriff may make reasonable time, place and manner restrictions and may even, in his discretion, deny all access when he believes that jail tensions would make access dangerous. Moreover, the district court's direction that "the specific methods of implementing" access are left to the Sheriff permits petitioner to deal with any actual administrative problem. The district court granted the Sheriff a temporary stay based on his representation that specific procedures would be developed to cover such matters as searches of reporters and their equipment, proper identification of press representatives, instructions as to items that could not be photographed, consent forms for interviews, etc.

The Ninth Circuit unanimously upheld this preliminary order. A preliminary injunction is of course a matter of the trial court's discretion.[7] The Sheriff has presented no reason why this Court should disturb the considered exercise of discretion by the courts below.

The preliminary injunction was based on a finding by the district court that respondents — the station and members of the public — would suffer irreparable injury if preliminary relief were not granted and that the Sheriff had failed to show that such relief would result in harm to his interests. The most important factor, of course,

[7] See, e.g., *Deckert* v. *Independent Shares Corp.*, 311 U.S. 282, 290 (1940); *Anheuser-Busch, Inc.* v. *Teamsters Local No. 633*, 511 F. 2d 1097 (1st Cir.), *cert. denied* 423 U.S. 875 (1975); *K-2 Ski Co.* v. *Head Ski Co.*, 467 F. 2d 1087 (9th Cir. 1972); 11 Wright & Miller, *Federal Practice and Procedure*, Civil, § 2948 (1973).

is the irreparable injury suffered by the exclusion of KQED from covering news stories at the jail.[8]

A further reason for not disturbing the trial court's preliminary order is that it provides an excellent opportunity for definitively resolving all problems relating to press access before this litigation goes to final judgment.[9] Thus, we believe that implementation of the reasonable access provided by the district court's order will demonstrate even to the Sheriff that his opposition is not well-founded. He may then decide voluntarily to change his policy. During the litigation he may also adjust the procedural details of access. Conversely, if actual problems are encountered by the Sheriff during the pendency of this case, that would be a reason for the district court to deny or limit permanent relief.

[8] Mr. Justice Blackmun has reasoned, in considering a restriction on reporting by the news media, that First Amendment interests are infringed each day the restriction continues:

> "The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1329 (1975). Cf. *Procunier* v. *Martinez*, 416 U.S. 396, 404 (1974) (judicial abstention imposes "high cost" when First Amendment interests at stake).

[9] Contrary to Mr. Justice Rehnquist's observation on the stay application that the order did not appear to be "preliminary" to further proceedings that might modify the injunction, there are indeed substantial matters that must be resolved in the trial court before any final judgment is entered. For example, as mentioned in note 3, *supra*, the question of access for spot news coverage must be examined to determine whether censorship of content must be enjoined. Further, as suggested by the Ninth Circuit, "to determine the questions of infringement of the correlative rights of the public and the media and the means by which these rights are to be implemented," the trial court should consider in detail how access is handled in other prisons.

In sum, this is not the occasion for plenary review by this Court. Any such review should await a final judgment and a complete record.

II. The Preliminary Order is Not Inconsistent with Pell v. Procunier and Saxbe v. Washington Post.

The Sheriff's basis for seeking certiorari is his contention that the injunction is in conflict with *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974) and *Saxbe* v. *Washington Post*, 417 U.S. 848 (1974). He argues that, so long as he mechanistically equates KQED's rights with those of the public in general — wholly excluding both or limiting both to guided tours — *Pell* and *Saxbe* provide him with a complete defense. This wooden argument was properly rejected by the lower courts.

The *sole* restriction on press access upheld by *Pell* and *Saxbe* was a prison rule against interviewing inmates specifically singled out by the press. The Court upheld this limited restriction because there was evidence in both cases that the restriction was necessary to avoid security problems caused by undue attention to "big wheels" who gained notoriety and influence over other prisoners. However, *Pell* and *Saxbe* did *not* authorize any press restrictions like those maintained by the Sheriff here. Indeed, the Court expressly pointed out in *Pell* that "*both the press and the general public are accorded full opportunities to observe prison conditions.*" 417 U.S. at 830 (emphasis added). Thus, in *Pell* the Court noted that "newsmen are permitted to visit both the maximum and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter." 417 U.S. at 830. In addition to tours,

newsmen were permitted "to enter the prisons to interview" randomly selected inmates. The same was true in *Saxbe.* There, the Court noted that "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there." 417 U.S. at 847. In addition, newsmen were permitted to tour *and photograph* any prison facilities *and interview* inmates they encountered. *Id.* at 847, n.5.

Thus, the *only* restriction upheld by *Pell* and *Saxbe* was the rule against the press singling out specific inmates for interviews, and this narrow rule was upheld only on a record showing that the press in fact had substantial access to the prisons. As the district court noted in the present case, the press access actually permitted by the institutions in *Pell* and *Saxbe* is *precisely the access sought by KQED.* Absent a showing that such access would interfere with a valid correctional interest, the courts below properly found that *Pell* and *Saxbe* do not preclude relief here.

The trial court found that the Sheriff's policy disables KQED from gathering nonconfidential information on matters of public interest. The court also found that reasonable access to the jail would not endanger security or result in any harm to petitioner's legitimate interests. Since the Sheriff's restrictions were found to be "greater than is necessary or essential to the protection of the particular governmental interest involved," the preliminary order was entirely appropriate. See *Procunier* v. *Martinez,* 416 U.S. 396, 419 (1974); *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).

Conclusion.

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

San Francisco Examiner

112th Year No. 216 ☆ 777-2424 WEDNESDAY, FEBRUARY 16, 1977 Daily 20c CITY EDITION

Riot at Santa Rita: 26 women locked up

Battle blamed on 'hardcore troublemakers'

By Don Martinez

Twenty-six women are in Santa Rita Prison's maximum security Greystone section as a result of a disturbance Feb. 6. Details were learned only today.

Lt. George Vien, night commander at the Alameda County facility, said all privileges for Santa Rita's 140 women were still revoked as a result of the melee.

"They're going to have to earn back the privileges," Vien said.

He said the privileges included commissary, movies, visiting and television.

Vien said the women in Greystone are hardcore troublemakers and are being housed in what usually is the men's section. Board partitions and a 24-hour security watch by a squad of matrons, isolate the women from male prisoners, he said.

Vien said the women in Greystone include both sentenced and unsentenced prisoners. Their offenses include armed robbery, assault with a deadly weapon, heroin possession and possession of heroin for sale, auto theft and burglary.

The uprising a week ago Sunday caused $1,000 in damage and involved 53 women and a number of jailers. It was sparked when an inmate and a deputy started arguing in the mess hall.

Sprinklers were ripped from the ceilings, door panels kicked out and lockers overturned.

"We originally moved all 53 to Greystone where they were locked in a dayroom," he said. "Since then, those prisoners who felt ready to return to their regular quarters have been screened and put back in their regular cells."

Despite a few skirmishes, the situation is pretty much normal, Vien said, and male prisoners are helping to keep the situation cool by yelling "shut up" when the women make noise.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,

Petitioner,

vs.

KQED, INC., et al.,

Respondents.

Petitioner's Opening Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES

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No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,
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vs.

KQED, INC., et al.,
Respondents.

Petitioner's Opening Brief

This case is being heard upon writ of certiorari to the Court of Appeals for the Ninth Circuit. The majority and concurring opinions of the Court of Appeals in this case are reported in 546 F.2d 284 (9th Cir. 1976); those opinions are reproduced in the Petition for a Writ of Certiorari. The Court of Appeals affirmed an unreported decision of the United States District Court for the Northern District of California, granting a preliminary injunction. The District Court's preliminary injunction and that court's accompanying memorandum and order are reproduced in the Appendix to the briefs (hereinafter abbreviated "A"), 66-71.

JURISDICTION

The judgment of the Court of Appeals was dated and filed November 1, 1976. Petitioner Sheriff Houchins ("Sheriff") filed a petition for rehearing, which was denied. The Sheriff applied to this Court for a stay pending review on certiorari, and on January 28, 1977, Mr. Justice Rehnquist granted the stay. Mr. Justice Rehnquist's opinion with respect to that application and stay is reprinted in Appx. to the Petition for a Writ, pp. 35-40. The Petition for Certiorari was filed in this Court on March 22, 1977, and certiorari was granted on May 23, 1977.

The statutory provision conferring on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the First Amendment, reading in relevant part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

as made applicable to the States by the Fourteenth Amendment.

QUESTION PRESENTED FOR REVIEW

The question presented for review is, did the District Court err in granting a preliminary injunction requiring the Sheriff to grant to Respondent KQED, Inc. ("KQED") and to other representatives of the news media greater access to the Sheriff's county jail facility than the Sheriff grants to members of the public at large?

STATEMENT OF THE CASE

This case involves the access of the news media to the inmates and premises of a county jail. As will be seen in detail hereafter, members of the general public, including the press, may tour the Alameda County jail facilities at Santa Rita on one of the semi-

monthly scheduled tours, and may communicate with the inmates in various other ways. However, the members of the public may not photograph the institution or inmates, and may not interview inmates, in the course of any tour. As will be further seen, media representatives have greater access to the facility and the inmates than do members of the public, but media representatives, like members of the public, may not photograph the institution or inmates, and may not interview inmates, in the course of the tour.

The complaint was filed in the District Court on June 17, 1975. (A.3) Plaintiffs invoked the court's jurisdiction pursuant to 28 U.S.C. § 1343(3), stating that the suit was authorized by 42 U.S.C. § 1983. The plaintiffs were KQED, Inc. and the Alameda and Oakland branches of the NAACP. KQED, Inc. is a non-profit corporation engaged in educational television and radio broadcasting. The NAACP plaintiffs are unincorporated associations (and the local branches of the national NAACP), whose members reside in Alameda and Oakland in Alameda County, California. Defendant Houchins was and is the Sheriff of Alameda County. (A.4) He has been employed by the Alameda County Sheriff's Department for thirty years, including five as commanding officer at Santa Rita. Reporter's Transcript ("R.T.") 80. He was the Assistant Sheriff (or Undersheriff) for five years, and was elected Sheriff effective January 1, 1975. (A.80) As Sheriff he has general supervision and control of all Alameda County jail facilities, including those located at Santa Rita.[1] (A.29) He does not control the health services for inmates. (R.T. 23-24).

In its complaint KQED alleged that it had asked the Sheriff for permission to inspect the maximum security portion of Santa

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1. Statistics in evidence with respect to this jail indicate that sentenced inmates are incarcerated, on the average, for thirty-two days, and that pre-trial detainees are incarcerated, on the average, for ten days. Defendant's Exh. F, R.T. 84-85. The nature of the inmate population has changed radically in recent years, in that the inmates are more difficult to handle. R.T. 95-97.

Rita, a building commonly referred to as Greystone, but that the Sheriff had refused the request. (A.5) KQED also moved for the issuance of a preliminary injunction enjoining the Sheriff, during the pendency of the action, from excluding KQED from the premises. (A.7-8) The Sheriff filed an opposition to the motion (part of which is reproduced at A. 29-59, and the remainder of which is in an unreproduced document accompanying the clerk's transcript), and an answer. (A.21) In the answer, the Sheriff alleged that if KQED were permitted to enter, then all other media representatives would have to be given similar privileges; that such spasmodic tours would be unduly disruptive to the operations of the facility; and that KQED, other media representatives, and the general public could view the facilities on the then-planned public tours. (A. 22-28) The Sheriff had told the foregoing to KQED in response to its request for admission to the facility. (A. 22, R.T. 186)

Further memoranda and affidavits were submitted to the District Court. An evidentiary hearing was held on November 6 and November 10, 1975. (Clerk's Transcript—"C.T."—52-55) On November 20, 1975, the District Court issued its preliminary injunction, A.70-71, together with its memorandum and order explaining the same. (A.66-70) The District Court determined (1) that press [media] access must be allowed greater than that afforded the general public; that is, the press must not be prevented from providing "full and accurate coverage of conditions", and may not be denied access to any of the facilities at reasonable times and hours; (2) that such access must at least include the use of cameras and sound equipment, and inmate interviews; and (3) that access may be restricted only in the event of jail tensions or other dangerous circumstances. (A.71)

On December 4, 1975, the Sheriff appealed to the Court of Appeals for the Ninth Circuit. (C.T. 77) On the same day the Sheriff sought and was denied a stay of the preliminary injunction in the United States District Court pending determination of the matter on appeal. (C.T. 76) The Sheriff then applied on the same day for a stay in the Court of Appeals. Circuit Judge Duniway granted immediate relief (A.1), and on December 24, 1975, the Court of Appeals, per Chambers and Snead, Circuit Judges, granted the stay, saying

> Upon due consideration, the petition for stay of injunction pending appeal is granted. The injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay. (Appendix to this Opening Brief)

A different panel of the Court of Appeals heard and decided the case, and the opinion of that court was filed on November 1, 1976. The complete text of the three opinions is printed in the Appendix to the Petition for a Writ of Certiorari filed with this Court on March 22, 1977. The subsequent history of the case has previously been related.

KQED did not allege, and the District Court did not find, that the access to the inmates and facilities afforded the members of the public at large was in any way inadequate. However, in view of the legal issue presented, it remains necessary to discuss the access afforded the members of the public.

A. Mail

The rules of conduct for inmates housed under conditions of minimum security are reproduced at A. 31-43, and for those housed in the maximum security facility, Greystone, are at A. 43-51. These rules included provisions with respect to mail. For inmates housed in the maximum security area, for example, the mail rules, A. 48-50, together with implementing instructions to staff, A. 50-52, may be summarized as follows: there is no limita-

tion on the number of letters an inmate may send or receive, nor on the length of letters; there is no limitation on the persons to or from whom letters may be sent or received. Letters to and from members of the public (including media representatives) would be inspected for contraband, but would not be read. Inmates without funds for pens, paper, and stamps would receive the same free of charge.

B. Visiting

Sentenced inmates may be visited from 11:30 a.m. to 2:30 p.m. on Sundays. There is no age limitation on visitors, except that a visitor under eighteen years of age must be accompanied by an adult. There are no lists of approved visitors.[2] Except for restrictions with respect to those visitors who have been previously confined in penal institutions, there are no limitations with respect to the identity of the visitor. (A. 41, minimum security, A. 47-48, maximum security.) Unless a media representative fell within these two limitations, any reporter could visit any inmate.

Pre-trial detainees may be visited on Sundays from 11:30 a.m. to 3:30 p.m., and on Tuesdays, Wednesdays and Thursdays from 6:00 p.m. to 8:00 p.m. (A. 30) In other respects the pre-trial detainees are subject to the same restrictions as are sentenced inmates, except, of course, that counsel may visit at any reasonable time.

Apart from visitation, pre-trial detainees may be interviewed by a media representative (but not by a member of the general public), if the written consents of the detainee, counsel, and the

2. This reflects an even more expansive policy than was approved in *Pell v. Procunier,* 417 U.S. 817, 824-825 (1974), where the Court found that the visitation policy in San Quentin, permitting only limited visits from members of the inmates' families, the clergy, their attorneys, and friends of prior acquaintance, did not seal the inmate off from personal contact with those outside the prison.

court having jurisdiction have first been obtained. (A. 30) These interviews could be photographed or recorded. (R.T. 89) Similarly apart from visitation, sentenced inmates may be interviewed upon their release from the facility. The Sheriff has offered to inform the media representatives upon request of the time of departure from Santa Rita and expected arrival in Oakland of the release bus containing inmates being released. (R.T. 98) Interviews of released inmates could, it is submitted, be conducted in an atmosphere free from any real or imagined pressures, either from other inmates, on the one hand, or from the Sheriff's staff, on the other. No media representative has ever asked the Sheriff for this information, or taken advantage of this offer.[3]

C. Telephone

Inmates in the maximum security facility may make unmonitored, collect telephone calls without restriction, R.T. 46-47, when in the dayrooms. (The dayroom schedule is in Defendant's Exh. G, R.T. 102-105.) Inmates housed in the minimum security facility may place telephone calls through the social services officer. (A. 38) The telephone access by inmates housed elsewhere in the facility is not disclosed in the record.

D. Public Tours

Since shortly after assuming office in January, 1975, the Sheriff planed public tours of Santa Rita. (R.T. 80-81, 129-30) Indeed, at the time the complaint was filed KQED knew that the tours would commence. (A.23) The first tour was held on July 14,

3. In addition to speaking to the inmates themselves, media representatives could interview those who have frequent access to the facility. These include teachers in the various classes, A.38, R.T. 69-70, medical personnel, A.39-40, attorneys or investigators, R.T. 71, nonbadge employees, such as bakers, butchers, cooks, and the like, R.T. 73, or volunteer counselors from various religious groups, R.T. 31.

[redacted]. At first the tours took place monthly, A. 25, 52-53, and perhaps due to the novelty of the situation, waiting lists built up. Beginning in January, 1976, the tours have been held semi-monthly. The tours have also been expanded in size so that thirty persons may go on each tour. (R.T. 60, 82-83, and Houchin's Aff'd. of December 4, 1975, in Appx. to Opening Brief) That situation still obtains. Since January, 1976, there has been essentially no waiting list. (Letter of December 30, 1975, to Court of Appeals, in Appx. to Opening Brief)

The District Court found that the tourists come from all walks of life. (A. 68) The tourists are not screened in advance and may in fact simply arrive on the evening of the tour. (R.T. 68, 75) Media representatives may go on the public tours.

The tours cover virtually all of the facilities at Santa Rita. The District Court heard testimony illustrating in detail the route of the tour, and the interiors and exteriors of the buildings visited, including descriptions and photographs of the foregoing. (R.T. 9-57) Plans of the facility were admitted in evidence to illustrate the course of the tour, Def. Exh. A, B, and C, R.T. 10, and photographs were also admitted in evidence. (Def. Exh. D-1 through D-20, R.T. 11-12) (Those photographs are also offered for sale at a reasonable price to those taking the tour. R.T. 12) The witness described the course of the public tour, and used the plans and the photographs to illustrate his testimony. He indicated on the plans the places where the photographer was standing, and the direction the camera was pointing when the photograph was taken. The portion of the tour relating to Greystone, for example, is described in R.T. 41-57; the plan of Greystone is Exhibit C, and the photographs of Greystone are Exhibits D-13 through D-20. Almost all portions of Greystone are covered on the tour: its cells, dayr[illegible] exercise yard, kitchen, and dining halls. The tourists also see [illegible]'safety cell", R.T. 55, but do not see the disciplinary cells (which are virtually identical

to all other cells: the "discipline" consists of the removal of privileges, R.T. 66-67, 78).[4]

The tour was criticized for being scheduled, rather than on demand, R.T. 176-177, A. 62; for not permitting the interviewing of inmates and the photographing of inmates and the facilities during the tour, R.T. 174, A. 62; for not including the pre-trial detainee barracks commonly known as Little Greystone, R.T. 174-175, A. 61, on the tour (although the interior of that building is identical to that of the other barracks which are included, R.T. 26-30, 179, Def. Exh. D-8 and D-9); and for not having inmates on view, R.T. 180, A. 61. The photographs were criticized for not showing inmates in the cells,[5] and for not disclosing the fact that the cells are covered with a wire mesh over which there is a large open space with catwalks, and heating and lighting equipment. (Def. Exh. D-16 and D-17, R.T. 52-53, A. 61) The photographs of the Greystone dayrooms, D-14 and D-15, were criticized for not including views of the urinals, showers, toilets, or television monitors. (R.T. 176, A. 61) These criticisms were, of course, from the point of view of a media representative, as such, and not from the point of view of a member of the public. There was no evidence or argument that the tours

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4. Greystone is the maximum security portion of the Sheriff's facility and was the only portion of the Santa Rita Rehabilitation Center involved in *Brenneman v. Madigan*, 343 F.Supp. 128 (N.D.Cal. 1972). After that decision was filed, extensive renovations and additions were made to Greystone, and programatic changes were made as well. As a result of those improvements (together with the County's assurances that it intended to proceed with the construction of new jail facilities) the *Brenneman* case was dismissed. R.T. 43, 49, 51, 55, 103-104, 107. The *Brenneman* case is referred to in footnote 1 of the opinion of the Court of Appeals in this case, 546 F.2d at 285, Appx. to Pet. for Writ, p. 2. In view of the comprehensive tour of the Greystone facility, the remark of the Court of Appeals in footnote 2 of its opinion, Appx. to Petition for Writ, p. 3, is inexplicable.

5. Only the Greystone portion of the facility consists of cells; the remainder of the facility consists of barracks with the exception of a few cells in the women's quarters. R.T. 41.

were inadequate in any way with respect to the public. No testimony whatever was presented by the NAACP plaintiffs or their members.

Testimony was presented on behalf of the Sheriff explaining why it was difficult to accede to KQED's request that the facility be available to the press on an unscheduled basis, and that such access permit interviewing of inmates and photographing of inmates and the facilities. Such a program would be extremely disruptive, for several reasons. During the tour the inmates must be locked in their cells or otherwise removed from contact with the visitors. (R.T. 44-45, 106) The facility runs on a tight schedule, involving very frequent moving of inmates. (R.T. 100-109, Def. Exh. G and H) Those movements include going to and from classes, R.T. 34, Def. Exh. E and D-11, meals, R.T. 34-37, work, and dayrooms and exercise yards, as well as movements to operate the facility and to transport pre-trial detainees to and from the courts. (Most of the courts are located a considerable distance away from Santa Rita.) Since the inmates must be removed from contact with the visitors while the visitors are present, the movements mentioned above come to a halt while the tour is in progress. (R.T. 102-109) The disruption not only consumes time and money, but also could result in angering the inmates (R.T. 100-101) making them more difficult to handle.

No interviewing or photographing of pre-trial detainees could be accomplished without their consent and the consent of their attorneys and the courts, R.T. 89; the difficulties involved in this aspect of the matter are compounded because one cannot identify a pre-trial detainee merely by looking at him or by determining where he is housed. (R.T. 89-92, 99) The photographing of sentenced inmates can lead to jealousies. (R.T. 90) For all inmates the potential for disciplinary problems is a danger not alleviated merely by obtaining the consent of the inmate being photographed or interviewed. (R.T. 92-93)

Photography presents additional problems in that there are security devices throughout the institution which may not be photographed. (R.T. 20, 48, 53, 56, 62-64, 86-88)

Close supervision is required by the Sheriff's personnel of anyone taking photographs or interviewing inmates. (R.T. 88, 112) Equipment brought on the premises must be searched. (R.T. 93-95)

Thus, the Sheriff concluded that visits could not be conducted on demand, or indeed on any basis other than a scheduled one. These scheduled tours for the public have previously been described; additional scheduled tours, exclusively for media representatives, permitting the use of cameras, but not the use of interviews, could also be accommodated. (R.T. 109-112, 116)

The District Court in its memorandum accompanying its preliminary injunction did not criticize in any way the access granted the public, as such, to the inmates or to the Sheriff's facilities (A. 68); indeed, the subject was apparently not even considered relevant.[6] Instead, the entire burden of the District Court's remarks was directed to a critique of the Sheriff's fears with respect to media entry, A. 69, and a comparison of his actions with the *media* policies of the San Francisco Sheriff and of the state authorities at San Quentin. (A. 68) (The District Court did not deal with the

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6. Thus District Judge Pregerson, writing for the Court of Appeals, is patently incorrect when he asserts that:

> Implicit in the trial court's memorandum granting the preliminary injunctions [sic] is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy. (546 F.2d at 286; Appx. to Pet. for Cert. p. 3)

On the contrary, there is no evidence that the District Court ever considered what the rights of the public were. KQED did not argue in its Motion for Preliminary Injunction that the public's rights were violated, and despite the fact that the Sheriff urged, in his Opposition, that the extent of the public's right of access was the central legal question, neither the District Court's memorandum nor its preliminary injunction addresses the point.

public access to San Quentin, which was much more limited than the public access to Santa Rita. See discussion pp. 24-25 below.) The District Court adjudged the Sheriff to have an inadequate media policy, and therefore enjoined him to develop an adequate media policy within the limits set forth in its memorandum and its preliminary injunction. The Court of Appeals affirmed.

SUMMARY OF THE ARGUMENT

KQED has no greater right of access to the Sheriff's facility, as a member of the press, than the right of access possessed by the general public. By issuing a preliminary injunction which accorded KQED and the press broader rights of access than those possessed by the public, the District Court acted improperly.

The District Court erred in failing to balance the rights of both the press and public against those of the Sheriff as a predicate to issuing its order. A proper balancing would have also included deference to Supreme Court admonitions against undue judicial involvement with prison administration, and consideration of alternative channels of communication flowing between the jail and the press and public.

Finally, the District Court erred in according insufficient weight to the Sheriff's interest in the internal administration and maintenance of security of the Santa Rita jail.

ARGUMENT

I. KQED Has No Greater Right of Access to Information Than The Right Possessed by the General Public.

Recent United States Supreme Court and Court of Appeals cases make it clear that the press has no constitutional right of access to information broader than that possessed by the general public. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution

does not, however, require government to accord the press special access to information not shared by members of the public generally . . . . That proposition finds no support in the words of the Constitution or in any decision of this court." *Pell v. Procunier*, 417 U.S. 817, 835-36; *Saxbe v. Washington Post Co. Inc.*, 417 U.S. 843, 850 (1974). "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)[7]; *New York Times Co. v. United States*, 403 U.S. 713, 728-730 (1971) (Stewart, J., concurring); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958) (courtroom); *In the Matter of United Press Assns. v. Valente*, 308 N.Y. 71, 77, 123 NE2d 777, 778 (1954).

This rule has been applied in a variety of contexts. In *Branzburg v. Hayes, supra*, at 684-685, the Court enumerated some of them as follows:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive sessions, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial jury.

See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (where the failure of a trial court to adopt stricter rules governing the use of the courtroom by newsmen resulted in a United States Supreme Court reversal of the state court conviction); *Estes v. Texas*, 381

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7. At page 17 the Court held "The right to speak and publish does not carry with it the unrestrained right to gather information".

U.S. 532, 539 (1965) (where, in reversing a conviction which followed a trial in which television cameras and sound equipment were allowed in the courtroom, the United States Supreme Court observed that "Neither of these two amendments [First and Sixth] speaks of an unlimited right of access to the courtroom on the part of the broadcast media."); *Rideau v. Louisiana,* 373 U.S. 723, 726 (1963); *Tribune Review Publishing Company v. Thomas,* 254 F.2d 883 (3d Cir. 1958) (state court rule forbidding the taking of photographs in courtrooms or the vicinity of courtrooms upheld); *Trimble v. Johnston,* 173 F.Supp. 651, 656 (D.D.C. 1959) (freedom of press does not encompass right to inspect documents not open to members of public generally); *Mazzetti v. United States,* 518 F.2d 781, 783 (10th Cir. 1975); see also Stewart, "Or of the Press", 26 Hast. L. Jour. 631, 636 (1975)[8].

The most recent reiterations of the principle that the press right of access is no more than co-equal with the public's right of access are found in *Pell v. Procunier, supra,* and *Saxbe v. Washington Post Co., supra.* In *Pell* the Supreme Court reviewed challenges by California state prison inmates and professional journalists, under the First and Fourteenth Amendments, to the constitutionality of § 415.071 of the California Department of Corrections Manual. The challenged section provided that "Press and other media interviews with specific individual inmates will not be permitted." The media plaintiffs contended, inter alia, that members of the press have a constitutional right to interview any prison inmate who is willing to speak to them, absent a clear and present danger to prison security or another substantial correctional interest. Asserted as well was the right to gather news without governmental inter-

8. Mr. Justice Stewart observes: "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. [Footnote omitted.] The public's interest in knowing about its government is protected by a guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."

ference, which right, it was argued, subsumed a right of access to sources of apparently newsworthy information. After stating the general rule that the First Amendment does not guarantee the press a constitutional right of access to information not available to the general public, the Court held that since § 415.071 did not deny the press access to sources of information available to members of the general public, the section did not abridge First or Fourteenth Amendment protections. 417 U.S. at 833-835. In *Saxbe* the Court reviewed a challenge to a similar section of the Policy Statement of the Federal Bureau of Prisons.[9] Observing that the policies of the Federal Bureau of Prisons regarding visitations to prison inmates did not differ significantly from the California policies considered in *Pell,* the Court found the two cases indistinguishable and reaffirmed the holding of *Pell.* 417 U.S. at 850.

A. THE DISTRICT COURT ERRED BY EXTENDING GREATER RIGHTS OF ACCESS TO SANTA RITA TO THE PRESS THAN THOSE ACCORDED THE GENERAL PUBLIC.

Based upon the foregoing authority, it is asserted that the District Court erred in issuing its preliminary injunction, A. 70-71, because the injunction extends to "KQED and responsible representatives of the news media" opportunities for access to Santa Rita which are more extensive than those afforded the general public. The injunction allows the press access to the jail at reasonable times and hours, as well as the right to use photographic and sound equipment and to interview individual inmates. The injunction permits access to be curtailed "for the duration of those limited periods when tensions in the jail make such media access dangerous". No mention is made, nor consideration given to the

9. Section 4b(6) of Policy Statement 1220.1A of the Federal Bureau of Prisons provided: "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities."

general public. In the memorandum and order accompanying its preliminary injunction, A. 66-70, the court's misapprehensions of the holdings of *Pell, Saxbe* and related Supreme Court cases are amply demonstrated. Judge Carter observed "this Court reads *Pell* as standing for the proposition that a prison or jail administrator may curtail media access upon a showing of past resultant disruption or present institutional tensions." (A. 68) Together with his characterization, as dictum (A. 67), of the *Pell* holding that press and public access to jails are coextensive, the judge's observation appears to be the legal foundation for the injunction.

The District Court's construction of *Pell* is incorrect. As has been discussed, the language contained at pages 833-834 of *Pell* amounts to a review of the present judicial rule that the press right of access is limited to an extent equal to the right of the general public. The language is not dictum. 417 U.S. at 850. Rather, it is clear that the Supreme Court was using this reiteration of the rule as a basis for upholding the validity of § 415.071 by which rule the California Department of Corrections was limiting press access to prisoners.

And, as will be discussed more fully below, the District Court's consideration of KQED's rights as a representative of the press, without an accompanying evaluation of the rights of access to the Santa Rita facility afforded the general public, amounts to error. If the equality of access rules set forth in *Pell* and *Saxbe* are to have any substance, evaluation of press rights must necessarily include juxtaposition of such rights with those of the public.

B. THE OPINION OF THE COURT OF APPEALS IN THE INSTANT CASE MISAPPREHENDS THE WELL-ESTABLISHED RULES REGARDING EQUALITY OF ACCESS.

Similarly, scrutiny of the three opinions prepared in the Court of Appeals in the instant case, 546 F.2d 284, indicates that two of the judges, quite disingenuously, either misapprehend or ignore the holdings of *Pell, Saxbe,* and their predecessors, while the third

judge recognizes the validity of the holdings but declares that they are at odds with his personal beliefs. (These opinions are printed in the Appendix to the Petition for Certiorari.)

In his concurrence Judge Duniway states: ". . . [I] confess to having serious doubts about the result [in the instant case], not because I think it is wrong in principle, but because I have great difficulties in reconciling the result with the decisions in [Pell] and [Saxbe]. I think it is clear beyond the possibility of argument that the preliminary injunction from which the appeal is taken grants to KQED and other media greater access to the Santa Rita Jail than is granted to the public."

Judge Pregerson's opinion construed the holdings of *Pell* as "simply stat[ing] that the news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right." As a pure proposition of law Judge Pregerson's construction is facially correct. *Pell* and *Saxbe* are the latest applications of a general rule of long standing that the press's right of access is not constitutionally broader or more pervasive than that of the general public. This rule has been stated in a variety of factual contexts, including access to foreign countries (*Zemel v. Rusk, supra*); access to scenes of a crime or disaster (*Branzburg v. Hayes, supra*); access to government documents (*Trimble v. Johnston, supra*); access to courtrooms (*Estes v. Texas, supra; Sheppard v. Maxwell, supra*); access to pre-trial detainees (*Rideau v. Louisiana, supra*); and access to prisons (*Pell v. Procunier, supra, Saxbe v. Washington Post Publishing Co. Inc., supra*) But Judge Pregerson fails to adhere to this stated principle: he says that "access needs of the news media and the public differ", and proceeds to attempt to justify a policy of noncoextensive access, contrary to what he has just stated the law to be.

Judge Pregerson also notes that: "Implicit in the trial court memorandum granting the preliminary injunction is the finding that the First Amendment rights of both the public and the news

media were infringed . . . ". The Judge concedes that "the memorandum does not explicitly mention the public's rights . . . ." Indeed, though KQED news personnel enjoy status as both news reporters and members of the general public, neither the District Court's memorandum and order (A. 66), nor the injunction itself (A. 70), extend rights of access to the general public that are coextensive with those extended to KQED news personnel. Further, the District Court's injunction does not grant to KQED a right of access to Santa Rita that, though different in manner, is "merely coextensive" with the access provided to the general public. The injunction permits KQED and other members of the news media access to the jail, including the Greystone portion, at all "reasonable times and hours." The injunction also permits the use of photographic and sound equipment as well as utilization of inmate interviews. Any fair and accurate reading of the injunction must disclose that it is addressed *solely* to the media, and allows the news media more time in and around the Santa Rita facility, access to the Greystone building, access to individual inmates for purposes of interviews, together with the opportunity to decide when, during reasonable hours, such access will be utilized and the opportunity to utilize both photographic and sound equipment. None of these rights is extended to members of the general public. Although KQED had the opportunity to challenge the Sheriff's policies as they applied to its staff members, as members of the general public, it did not do so; and the NAACP plaintiffs—members of the public—presented no evidence, and are not covered by the injunction. No finding, implicit or otherwise, is contained in the District Court's decision concerning the adequacy of access to Santa Rita afforded the general public.

Judge Hufstedler asserts that "*Pell* [does not] mean that regulations that are reasonable in controlling access to prisons and prisoners by the general public will always pass the First Amendment test when the same regulations are imposed on the news media."

Judge Hufstedler apparently bases her opinion not on the rights of access of the press and public as they have been examined by the Supreme Court and other courts in *Pell* and its predecessors, but rather upon her opinion on two points: first, what sort of information about prisons and prisoners the public should be informed of, and second, what is the "means by which the information is to be gathered." On the second point, the Judge is speaking of access, and her conclusion is that noncoextensive access is appropriate, contrary to the authorities previously discussed.

It is respectfully submitted that Judge Hufstedler used the wrong starting point in considering the relative First Amendment rights of press and public. As will be shown infra, the rights of access to government facilities which are not generally open to the public must, and should be, scrutinized by means of appropriate balancing tests. That such rights of access are the same for the media and for the public has been made clear in opinions of this Court, of lower courts, and of commentaries upon the state of the law on the subject made by a justice of this Court. The citizen is entitled to the same information as the reporter; stated differently, citizens may find things out for themselves, and are not compelled to have their news filtered through the channels of the media.

Based upon the foregoing it is therefore asserted that the decision of the Court of Appeals was improper and should be reversed.

II. The District Court Erred in Failing to Balance the Rights of Both the Press and Public Against Those of the Sheriff as a Predicate to Issuance of its Order

It has been demonstrated that due to its misconstruction of the holdings of *Pell*, *Saxbe*, and the cases from which they flow, the District Court erroneously extended disproportionate access to the Santa Rita jail facility to KQED. It is respectfully submitted as well that the District Court improperly undertook to balance

KQED's rights of access against the Sheriff's concerns, without balancing the general public's rights (which are the same as the media's).

In *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), the Supreme Court held "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." This holding has been widely followed. See, e.g., *Bullock v. Mumford*, 509 F.2d 384, 387 (D.C. Cir. 1974)[10]; *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir. 1974)[11]; *A Quaker Action Group v. Morton*, 516 F.2d 717, 725 fn.27 (D.C. Cir. 1975). General guidelines for evaluating challenges to government regulations asserted to limit free speech are also set forth in *United States v. O'Brien*, at pages 376-77 as follows:

> . . . [A] governmental regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendent freedoms is no greater than is essential to the furtherance of that interest. (See also *A Quaker Action Group v. Morton*, 516 F.2d 717, 725-26 (D.C. Cir. 1975).)

Respondents have cited no case, either before the District Court or the Court of Appeals, and we know of none, which authorizes a different evaluation of a governmental regulation to be applied to the press apart from the general public.

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10. . . . [T]he Amendment does not protect behavior made unlawful by legitimate legislation or regulation, enacted for purposes unrelated to the suppression of free expression. *United States v. O'Brien*, 391 U.S. 367 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966).

11. . . . [I]t is well established that protected speech may be subject to reasonable limitation when important countervailing interests are involved.

And the failure of either the District Court or the Court of Appeals to give consideration to the Sheriff's policies as they affect the general public amounts to error.

A. THE DISTRICT COURT ERRED BY UNDULY INVOLVING ITSELF IN PROBLEMS OF PRISON ADMINISTRATION NOT AMENABLE TO SOLUTION BY JUDICIAL DECREE.

The balancing of purported free speech rights of both KQED and the general public must do more than merely recognize the special facts of this particular case; it also must include recognition of and deference to forceful admonitions by this and other courts against undue involvement in matters of prison administration. Such admonitions as those set forth in *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974), recognize that special problems inherent in prison administration do not lend themselves to solution by judicial decree. In *Procunier*, Mr. Justice Powell observed that despite the duty of a federal court to recognize valid constitutional claims arising from the context of a prison, "Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. [Footnote omitted.] More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible to resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of

which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. [Footnote omitted.] Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." See also *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974), *Baxter v. Palmigiano*, 425 U.S. 308 (1976), *Meachum v. Fano*, 427 U.S. 215 (1976).

The latest reiteration of this Courts' statements urging judicial deference to the reasonable decisions of prison administrators, even where such decisions impinge on some areas of free speech and association in which noninmates would be protected by the First Amendment, is in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, ... U.S. ....., 45 U.S.L.W. 4820 (1977). In *Jones* the Supreme Court affirmed North Carolina Department of Correction regulations which prohibited inmates from soliciting other inmates to join the appellee organization (a prisoners' labor union), barred all meetings of the union, and prohibited delivery of bulk mailings of union publications. Reversing the decision of a three-judge district court, this Court noted (at 4821): "The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." Citing *Pell v. Procunier* and *Procunier v. Martinez* at length, the Court observed "the concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution." And that "[b]ecause the realities of running a penal institution are complex and difficult, we have also recognized the wide ranging deference to be accorded the decisions of prison administrators."

In the instant case testimony was presented to the District Court that to allow press access to the Santa Rita jail on demand

would be extremely disruptive for many reasons, some of which are set forth in the Statement of the Case, *supra* pp. 10-11. For example, it was shown that such access would interfere with the facility's schedule, involving the frequent movement of inmates to and from classes, court, work and meals; would require locking up all inmates upon the entrance of visitors into the facility; would necessitate enhanced security procedures to monitor the flow of visitors and their belongings into the jail; would increase inmate tensions; and would imperil the continued viability of security devices presently extant in the jail. These concerns of the Sheriff were brushed aside by the District Court, as it proceeded with its balancing of those concerns against media demands; and thus there were two errors: first, the balance should have been against the rights of the general public, and second, the District Court in any event failed adequately to defer to the Sheriff's judgment.

B. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER ALTERNATIVE MEANS OF PRISONER-PUBLIC-PRESS COMMUNICATION.

It is apparent that no balancing of the rights of the press and public with those of prison administrators in a factual context such as the one in the case at bar would be complete without scrutiny of alternative channels of communication between Santa Rita inmates and those who seek information from them. In *Pell v. Procunier, supra*, at 823-824 the Supreme Court held as follows:

> In order properly to evaluate the constitutionality of [a regulation restricting the access of the press to state prison inmates] we think that the regulation cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison. We recognize that there 'may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning' and 'that [the] existence of other altrenatives [does not] extinguis[h] altogether any constitutional interest . . . in this particular form

> of access.' *Kleindienst v. Mandel,* 408 U.S. 753, 765 (1972). But we regard the available 'alternative means of [communications as] a relevant factor' in a case such as this where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.' "

The Court in *Pell* lists the alternative means of communication which were available:

1) The use of the mail, subject to censorship only through a process offering the prisoner minimum procedural due process safeguards, and

2) The right to receive visits from members of their families, their clergy, attorneys, and friends of prior acquaintance. (The Court in *Pell* pointed out at pg. 825: "If a member of the press fell within any of these categories there is no suggestion that he would not be permitted to visit with an inmate.") This right provides the unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy or attorneys who are permited to visit them at the prison.

Moreover, in light of the statement in *Pell* that both the public and the media had "full opportunities to observe prison conditions", 417 U.S. at 830, the Sheriff in the instant case introduced evidence as to what the public access was in San Quentin, the prison involved in *Pell,* R.T. 75-77, 130. The tour aspects of that access are described in A. 54-59, R.T. 153-155 and briefly stated:

a) consist of a dinner tour,
b) with a one-year waiting period, on which
c) no cameras are permitted, and which
d) provided no contact with inmates, and
e) did not permit entry into the maximum security area.

Finally, the Court in *Pell* observed that the availability of such alternatives is impressive in light of the fact that " '[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a state and a private citizen' and that the 'internal problems of state prisons involve issues . . . peculiarly within state authority and expertise,' " citing *Preiser v Rodriguez,* 411 U.S. 472, 492 (1975).

The District Court's order improperly fails to consider any of the following uncontroverted evidence presented by the Sheriff (and described in detail in the Statement of the Case at pp. 5-11, *supra*):

a) In the Santa Rita maximum security area there is no limitation on the number of letters that an inmate may send or receive, nor is there any limitation on the persons to whom or from whom letters may be sent or received;

b) Although letters to and from members of the general public, including the media, are inspected for contraband, they are not read, and funds for pens, paper and stamps are provided free of charge for inmates who cannot afford them;

c) Anyone, of any age, including members of the press, save those previously confined in a penal institution and minors under 18 (who may accompany an eligible adult), may visit any inmate from 11:30 a.m. to 2:30 p.m. on Sundays;

d) Pre-trial detainees may be visited on Sundays from 11:30 a.m. to 3:30 p.m. and on Tuesdays, Wednesdays and Thursdays from 6:00 p.m. to 8:00 p.m., and may be interviewed by media representatives at other times by prior consent of the detainee, counsel, and the court having jurisdiction;

e) Sentenced inmates may be interviewed upon their release from the facility, the Sheriff having offered to inform the media upon request of the time of departure from Santa Rita and expected arrival in Oakland of the buses carrying released inmates;

f) Maximum security inmates may make unmonitored collect calls without restriction, and other inmates may make telephone calls through the social services officer;

g) Since July 14, 1975, public tours, monthly through December 1975, and semi-monthly thereafter, have been conducted, with no waiting lists since January, 1976.

This extensive availability of alternative means of access to prisoners and information about Santa Rita was not considered by the District Court, despite the admonition contained in *Pell* that regulations such as the one in the instant case could not properly be evaluated except in light of such alternative means of communication. This failure, by itself and together with the other irregularities on the part of the District discussed in this brief, amounts to reversible error.

C. A COMPLETE AND PROPER BALANCING OF THE RIGHTS OF PETITIONER WITH THOSE OF THE PRESS AND GENERAL PUBLIC REQUIRES THE CONCLUSION THAT THE POLICIES CHALLENGED IN THE DISTRICT COURT WERE PROPER AND SHOULD NOT HAVE BEEN DISTURBED.

The standards for review of a government regulation with purportedly adverse effects upon free speech have been reviewed at pages 19-26, *supra*. Application of these standards to the instant case compels the conclusion that despite the District Court's injunction, the means of access to information in and about the Santa Rita jail facility are constitutionally adequate.

It is important to point out that both the press and the public may constitutionally be denied access to government property, not open to the general public, including jails, even when such access is sought in order to seek information or to disseminate it. These observations are contained in *United States v. Farinas*, 448 F.2d 1334, 1338 (2nd Cir. 1971):

> The First Amendment is not a license to impede and disrupt the orderly performance of an essential function of government. *United States v. O'Brien*, 391 U.S. 367 (1968). The public and private interests at stake must be weighed. For instance, the Government's use of a public building for a valid and specific governmental function entitles it to limit the exercise within that building of First Amendment rights to

> the extent that such exercise would interfere with the performance of that function. *Adderley v. Florida*, 385 U.S. 39 (1966). (See also *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1283-1287 (Wright, J.) (D.C. Cir. 1972)[12]; *Asociacion de Trabajadores etc. v. Green Grant Co.*, 518 F.2d 130, 136 fn. 14 (3rd Cir. 1975).)

The exercise of rights connected with First Amendment freedoms may constitutionally be curtailed in government facilities not open to the general public. Limitations upon the gathering of information intended for eventual publication to the public have therefore been upheld where the information sought is contained in courtrooms;[13] government archives;[14] and prisons.[15]

In the instant case testimony presented by the Sheriff to the District Court establishes that there is a substantial jail security interest that is imperiled by press interviews with prisoners and other public access to the jail on request. A tight schedule, involving frequent moving of inmates and detainees to and from meals, classes, courts and work and requiring attendant security for the benefit of visitors, jail personnel, inmates and the general population outside the jail cannot accommodate itself readily to outside access by press or public that is not agreed upon by the Sheriff in advance. The continued effectiveness of facility security devices will also be adversely affected if they are photographed.

A thorough mechanism for monitoring the ingress and egress of the general public is also a necessity where access is extended.

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12. "It cannot be said that speech may be curtailed every time the state can point to a legitimate governmental interest . . . . But neither can it be true that the constitution permits anyone to do anything at any time so long as he acts in the name of free expression." (472 F.2d at 1283).

13. *Sheppard v. Maxwell, supra; Estes v. Texas, supra; Tribune Review Publishing Company v. Thomas, supra; Manetti v. United States, supra.*

14. *Trimble v. Johnston, supra.*

15. *Pell v. Procunier, supra; Saxbe v. Washington Post Co., supra.*

Tours by advance arrangement allow such monitoring to be planned for. Press or public access upon short notice, by contrast, would require the allocation of jail personnel on a permanent "on call basis."

In light of the reluctance of this Court and other federal courts to intrude unduly into the internal administration of jails, in light of the alternative channels of communication available to the press and public, and to prisoners, and in light of the Sheriff's necessary interest in a rigorous security policy at the jail, it is submitted that the present policy of jail tours and other forms of communication is constitutionally adequate and that the District Court's injunction was improper.

CONCLUSION

For all the foregoing reasons, it is urged that the decisions of the District Court and Court of Appeals should be reversed, and the instant case remanded to the District Court with instructions that the case be dismissed or, in the alternative, retried in accordance with the principles set forth in this brief.

Respectfully submitted,

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(Appendix to Follow)

Appendix

United States Court of Appeals
for the Ninth Circuit

Filed—Dec 24 1975
Emil E. Melfi, Jr. Clerk
U. S. Court of Appeals

No. 75-3643

KQED, INC., et al.,
Plaintiffs-Appellees

vs.

THOMAS L. HOUCHINS, Sheriff of Alameda County,
Defendant-Appellant

ORDER

Before: CHAMBERS and SNEED, Circuit Judges

Upon due consideration, the petition for stay of injunction pending appeal is granted. The injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay.

/s/ RICHARD H. CHAMBERS
/s/ JOSEPH T. SNEED
U.S. Circuit Judges

KQED, INC., et al. v.
THOMAS L. HOUCHINS
(Civ. No. C-75-1257-OJC, N.D. Calif.)

9th C/A No. .....

AFFIDAVIT OF THOMAS L. HOUCHINS

State of California }
County of Alameda } ss.

I, THOMAS L. HOUCHINS, being first duly sworn, depose and state that:

1. I am the Sheriff of the County of Alameda, State of California, and am the defendant and appellant in the within action.

2. The public tours of the jail facilities (discussed by the District Court in its Memorandum at p. 3, lines 11-22) were, by action of the Board of Supervisors of Alameda County taken on December 2, 1975, extended for a further period of six months commencing January, 1976. Instead of the tours being monthly, as is the current program, the tours will be twice a month. Members of the public or of the media may go on these public tours. Your affiant has stated to the Board of Supervisors (and to the District Court) his intention to include provisions for the public tours in his departmental budget request for the fiscal year commencing July, 1976. Of course, the action the Board of Supervisors will take on that request is at present unknown to your affiant.

3. In discussing the public tours, the District Court (in its Memorandum at p. 3, lines 26-29) noted certain objections by the media representatives. The only area of significance in the jail not entered by the media was that building called "Little Greystone". The exterior of that building is viewed on the tour. The interior of the building is substantially identical to the other barracks facilities which are included on the tour, and of which a photograph is available. To the extent that the available photographs

have omitted items of interest—and only two "views" were mentioned at the trial as missing—new photographs can and will be taken and made available to the public and press on the same basis as are the other photographs.

4. The preliminary injunction requires your affiant to grant media representatives access to the jail "at reasonable times and hours"; the only express guideline with respect to "reasonableness" stated in the injunction is that your affiant may deny access during "those limited periods when tensions in the jail make such access dangerous." In its Memorandum at p. 5, lines 10-22, the District Court expands upon the same point, requiring specific dangers in fact to exist before access can be denied. There is uncontradicted evidence that jail operations come to a virtual standstill in the presence of a media tour. In Greystone (the maximum security facility), for example, the normal movement of inmates to and from the day rooms, exercise yard, dining halls, and visiting areas, as well as all other activities of the inmates, would cease. The effect is similar throughout the facility. The inconvenience to inmates and to staff is beyond dispute. The cost of staff assistance in moving the inmates and the media representatives, and in protecting the latter, are simply unknown to your affiant at this time. If your affiant is forced to comply with the preliminary injunction, the damage will be done throughout the pendency of the appeal in this Court.

Dated: December 4, 1975

Thomas L. Houchins
THOMAS L. HOUCHINS

SUBSCRIBED AND SWORN to before me
this 4th day of December, 1975
KELVIN H. BOOTY, JR.
Notary Public

December 30, 1975

Honorable Richard H. Chambers
Chief Judge
Honorable Joseph T. Sneed
Circuit Judge
United States Court of Appeals
Ninth Circuit
Seventh and Mission Streets
San Francisco, California

Re: KQED, et al. v. Thomas L. Houchins
U. S. Court of Appeal No. 75-3643

Dear Chief Judge Chambers and Judge Sneed:

Counsel for appellant is in receipt of the undated Motion for Clarification or Amendment of Order Granting Stay, etc., a copy of which was mailed to the undersigned on December 29, 1975. Should the Court decide to hear the Motion, then an appropriate response will be prepared and filed on behalf of appellant.

In the meantime, however, one point should be clarified. Counsel for the plaintiffs-appellees alleges that "KQED will remain totally barred from covering newsworthy stories at the Santa Rita Jail during the pendency of this appeal", so long as the stay order remains in effect. (*Motion*, p. 3) Similarly, it is stated that "the *status quo* is that plaintiff KQED is totally excluded from doing news stories at the County Jail" (*Motion*, p. 5). This is simply incorrect. There are public tours of the Santa Rita facility; these tours are held on the second and fourth Mondays of each month, commencing January, 1976. Up to twenty-five persons may go on any one tour. As of December 29, only sixteen persons had signed up for the January 12 tour, and twelve persons had signed up for the January 26 tour. Accordingly, any representative of

KQED, or of any other news media, may go on those tours merely by placing his name on the list. Moreover, media interviews of pretrial detainees and of sentenced inmates may be conducted now, as before, on the normal basis: Convicts may be interviewed during visiting hours, and pretrial detainees may be interviewed at any time (provided that the consent of the inmate, his counsel, and the court having jurisdiction of his case has first been obtained).

Since discussions of the foregoing are contained in the record before the District Court, and will be involved in the appeal, further comment will be deferred until a more appropriate stage in these proceedings.

Respectfully,
RICHARD J. MOORE
County Counsel

By KELVIN H. BOOTY, JR.
Senior Deputy County Counsel

KHB:st

cc: Honorable Oliver J. Carter
Chief Judge
United States District Court
450 Golden Gate
San Francisco, California

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Attorney at Law
Eighth Floor
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San Francisco, California 94108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1310

THOMAS L. HOUCHINS,
Petitioner,

—v.—

KQED, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS KQED, *et al.*

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Respondents.

Brief for Respondents KQED, et al.

QUESTION PRESENTED

Until this suit was filed, the sheriff completely excluded both the press and the general public from the county jail. Upon learning of an inmate's suicide in circumstances raising serious questions about jail conditions and compliance with court orders, respondent KQED sought access to the jail to ascertain and report the facts. Petitioner flatly refused. The district court found that news access reasonably necessary to prevent concealment of jail conditions from the public would not harm any legitimate interest of the sheriff. The court thus granted a preliminary injunction requiring the sheriff, under procedures to be determined

by him, to admit reporters at reasonable times except when jail security might be threatened. The question presented is whether, in these circumstances, the court erred in authorizing different access for news reporters than the sheriff now chooses to allow the public at large.

STATEMENT OF THE CASE

A. Proceedings In The Courts Below

Respondents (plaintiffs in the district court) are KQED, Inc. and the Alameda and Oakland branches of the NAACP. KQED is a nonprofit corporation engaged in educational television and radio broadcasting. Publicly-supported, KQED serves the counties in the San Francisco Bay Area. It maintains a daily television news program, entitled "Newsroom." The members of the NAACP plaintiffs are residents of Alameda County, California, and allege both an interest in knowing conditions in their county jail (whose prisoners are disproportionately black) and reliance on local news media to inform them so that they can participate meaningfully in the current public debate on county jail conditions (A. 4).[1/]

1/ Citations to "A" refer to pages of the Appendix.

Petitioner Houchins is the Sheriff of Alameda County and operates the county jail. When the sheriff excluded KQED and all news reporters, as a matter of general policy, from investigating events and conditions at the jail, respondents filed this suit and moved for a preliminary injunction (A. 7). The motion was based on supporting affidavits (A. 8,13,14,16, 18,59,60,63,64) and on the testimony at an evidentiary hearing of the Sheriff of San Francisco County, an official from San Quentin State Prison and several experienced news reporters.

The district court granted preliminary injunctive relief, requiring petitioner to allow reasonable access by reporters to the jail (A. 66-71). The specific methods of implementing such access were left to the sheriff. He then sought and was granted a temporary stay of the order, to enable him to develop specific procedures for access (R.66-68,74).[2/] But instead of implementing any such procedures, the sheriff filed notice of appeal and obtained a stay from two judges of the Ninth Circuit. The

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2/ Citations to "R" refer to pages of the certified Record on Appeal in the Ninth Circuit.

appeal was then expedited on respondents' motion.

On November 1, 1976, the Court of Appeals unanimously affirmed the district court's order. On December 22, 1976, the court below denied rehearing, no member of the entire Ninth Circuit voting to rehear the case en banc. The Court of Appeals denied a stay pending certiorari. A stay was granted by Mr. Justice Rehnquist on January 28, 1977.

B. Statement of Facts

1. Events leading to this suit.

KQED's Newsroom has for many years reported regularly on news at prisons and jails in the San Francisco Bay Area (Tr. 167-70; A. 9-10; P.Exh. 4,5).[3/] A large number of stories have been covered on the premises of the institutions, with film, video or still camera. Included have been reports from the San Francisco, Contra Costa, San Mateo and Santa Clara County jails and San Quentin and Soledad prisons. None of this activity has ever caused

3/ Citations to "Tr." refer to pages of the Reporter's Transcript of the evidentiary hearing held on November 6 and November 10, 1975. Citations to "P.Exh." and "D.Exh." refer, respectively, to plaintiffs' and defendant's exhibits received in evidence at the hearing.

any institutional disruption of any kind (Tr. 170-71; A. 10, 13, 14-15, 64-65).[4/]

In March, 1975, KQED's Newsroom learned of and reported the suicide of a black prisoner at the Alameda County jail (Tr. 171; A. 11). KQED received information that the suicide occurred shortly after a county judge had ordered a psychiatric examination of the inmate, but officials had not provided one (A. 11). The suicide occurred in a facility whose conditions a federal court in San Francisco had previously condemned as "shocking and debasing," violating "basic standards of human decency."[5/] KQED also reported statements by a psychiatrist employed at the jail that conditions in the facility were partly responsible for the prisoners' emotional problems. The psychiatrist

4/ In covering stories on location in jails and prisons, KQED recognizes that inmates are entitled to privacy, and this is respected. As a matter of policy, KQED does not photograph or interview inmates without their consent (Tr. 170-71; A. 11). When appropriate or required, KQED obtains formal written consents (Tr. 171).

5/ The "truly deplorable" conditions were found to be cruel and unusual punishment. Brenneman v. Madigan, 343 F.Supp. 128, 132-33 (N.D. Cal. 1972).

was fired after he appeared on Newsroom (Tr. 186-87). KQED quoted the sheriff as denying that the conditions were responsible for the prisoners' problems (A.11).

KQED's news anchorman telephoned petitioner Houchins and requested permission to see the jail facility in question and take pictures there (A.11; Tr. 171). The sheriff refused, stating only that it was his "policy" not to permit any press access to the jail (Id.). He gave the same response to another television reporter who sought to cover stories of alleged gang rapes and poor conditions at the jail (Tr. 208-209). KQED attempted to follow events with subsequent reports on a Board of Supervisors investigation of certain jail conditions (Tr. 172-73), and with stories of the public debate on whether and where to build a costly new jail (P.Exh. 5), but without access to the jail.

Until this suit was filed, access to the jail was denied to all, even though the sheriff testified that he had never heard of any disruption in any jail or prison, anywhere, because of news access (A.69; Tr. 126-28).[6/]

6/ A previous sheriff had conducted one

2. The guided tours.

After this suit was filed, petitioner initiated a series of six monthly guided tours for the public.[7/] Each tour was limited to 25 persons (Tr. 174). The tours were booked on a first come-first served basis. Reporters were permitted to go on the tours if they signed up in time. Since public interest exceeded tour capacity, all six tours for 1975 were completely booked within a week after they were announced in July (Tr. 116-17; A. 59-60, 63-64). Thus, anyone, including a news reporter, who did not instantly sign up for a tour weeks or months in advance was completely barred from the jail for the balance of the year (Id.).

6/ continued.

"press tour" in 1972, attended by reporters and cameramen. But the facility had been "freshly scrubbed" for the tour and the reporters were forbidden to ask any questions of the inmates they encountered (A. 16-17). Subsequent attempts by reporters to cover stories at the jail were rebuffed by the sheriffs (Id.; Tr. 207-10).

7/ The sheriff testified that he initiated the tours in order to gain support for the construction of new jail facilities in the county (Tr. 81, 129).

At the outset of each tour, a jail official laid down the ground rules for the tourists. It was forbidden to speak with any inmates who might be encountered (A. 61; Tr. 62, 175). No photographs were permitted (A. 61; Tr. 62, 174). The sheriff offered a series of 20 photographs for sale to the tourists, at $2 each or $40 for the set (Tr. 65; A. 61).[8/]

The evidence before the district court demonstrated several ways in which restriction to the tours frustrated reporting of jail conditions to the public:

(a) The tours were "guided" by several guards (Tr. 57-58; A. 61-62), who took the tourists through most but not all of the jail facilities. Excluded was the notorious "Little Greystone" (A. 61; Tr. 30, 174-75), the scene of alleged beatings, rapes and poor conditions (Tr.

8/ The photos are D.Exh. "D". There were no photos of the women's cells (Tr. 64), of the "safety cell" (Tr. 65), of the "disciplinary cells" (Tr. 67), of the interior of Little Greystone or of the bakery, laundry or fire station (Tr. 39). The photo of a Big Greystone cell omits the wire mesh ceiling and the catwalk above the cell that allow guards to peer down on the inmate (A. 61; Tr. 176). The day room photo omits the television monitor that observes inmates and the open urinals (Id.).

174-75, 208). Also excluded were the "disciplinary cells" (Tr. 67).

(b) The tourists were not allowed to ask even simple questions of randomly encountered inmates.[9/]

(c) The sheriff required that inmates generally be removed from view (Tr. 106). Thus, the tourists never saw normal living conditions at the jail (A. 61).

(d) The tourists were not permitted to take any cameras with them. A reporter testified that "The most effective thing we can do on television is not filter [the information] through a reporter, but show it directly" (Tr. 180). Other reporters stated that the inability to publish realistic pictures of jail conditions made it difficult to convey accurate information to the public (A. 64-65; A. 62; cf. A. 16-18). The sterile and unrealistic photos proffered for sale by petitioner showed only selected

9/ Thus, for example, tourists would not be allowed to ask an inmate they saw "What did you have for lunch?" or "Is it always this clean?" or "What was it like during the fire last week?" or "How's the noise level here?" or "Did the recent women's riot lead to any reforms?"

plant and equipment and did not hint at the actual conditions of life in the jail (A. 61; Tr. 176).

(e) Finally, offering only a periodic tour made it impossible to cover a specific event or follow a developing news story (Tr. 175-76; A. 62-63). News events do not coincide with the sheriff's schedule of tours. Limitation to a scheduled tour made it impossible to cover an escape, a fire or a suicide as soon afterward as access could safely be provided, or a new facility, program or other event of public interest. It also made it possible for the jail to be "scrubbed up," as was done for a press tour conducted by a previous sheriff (A. 17).

3. Access to other jails and prisons.

The evidence before the district court showed that other jails and prisons in the area do not have limitations of the kind imposed by petitioner Houchins, that they routinely provide free press access and that such access creates no problems whatever:

a. San Francisco County.

The Sheriff of San Francisco operates

four jails. He routinely authorizes reporters to enter and cover stories in his jails (Tr. 190-92; A. 15). The reporters are permitted to use cameras and sound equipment (Tr. 196, 216). The sheriff also permits interviews of both inmates and staff (Tr. 196). Never, on any occasion, has this access created any security problems or any disruptions (Tr. 191-92; A. 15). This access does not disrupt jail routine or the constant movements of prisoners within or without the jail (Tr. 192-95, 198-99). Nor does it create extra work or overtime for jail staff (Tr. 203). Inmate privacy is protected by guidelines prescribing that none will be photographed or interviewed without his consent (Tr. 202).

Further, the San Francisco Sheriff advanced affirmative reasons, from the point of view of a correctional administrator, for admitting reporters to the jails. He testified that jails "routinely end up being places that are extraordinarily and most unnecessarily abusive to people" and that news coverage of conditions enhances public awareness and thus motivates county government to provide adequate funds for more decent facilities (Tr. 193-94; A. 15).

b. Other County jails.

The evidence showed that KQED and other stations have done stories on the premises of numerous other county jails and prisons, without any difficulties or disruptions of any kind (A. 9-10; P.Exh. 5; Tr. 167-70). The State of California's Guidelines for Local Detention Facilities, offered in evidence by petitioner (D. Exh. I), state that: "As in any government operation, the public has a right to know how and why its tax dollars are spent in detention and corrections. . . . In particular, the various news media should be provided with accurate and timely information so that the public can be adequately informed at all times" (p. 22).

c. San Quentin.

San Quentin's Public Information Officer testified about the press policy of the California Department of Corrections and its implementation in San Quentin (Tr. 143-65). The Department provides for completely open news access to the prisons, with reporters allowed to use cameras and sound equipment, to view all areas of the prison (including all maximum security areas), to talk with prisoners generally and to interview prisoners of their choice (Id.,

P.Exh. 3) The Department's premise is the citizen's "right to know," through the press, conditions in the prisons (Tr. 144; P.Exh. 2, 3).

The San Quentin official testified that arrangements for reporters to come to the institution are very simple, and are made the same day of the request (A.64-65; Tr. 148-49). The official usually accompanies the reporters, but no guards are part of the escort (Tr. 149-50). Although there are considerable movements of prisoners within San Quentin (they are "moving all day long," including some who go to court outside the prison, Tr. 150-51), San Quentin has experienced no disruptions or security problems whatever because of press access (Tr. 151). Inmates are in their cells or going about normal institutional activities while reporters are present (Tr. 155, 164). The press could of course be excluded by the warden if any security problem developed (Tr. 161-62). None has.[10/]

In addition to providing open news media access, San Quentin has frequent tours

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10/ The record here shows that the California authorities have completely abandoned the press restriction they defended as essential to security in Pell v. Procunier, 417 U.S. 817 (1974).

for the general public, during which inmates are regularly encountered (Tr. 153-54).

d. National policy.

The district court received in evidence the relevant standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (P.Exh. 1). The Commission was appointed by the Law Enforcement Assistance Administration to formulate standards for institutions benefitting from LEAA grants. Petitioner Houchins has received substantial funds from LEAA, including a grant for the reconstruction of the jail (Tr. 118-19), but he does not comply with the standards. Standard 2.17 provides that:

> "Representatives of the media should be allowed access to all correctional facilities for reporting items of public interest consistent with the preservation of offenders' privacy."

Current policy for the Federal Bureau of Prisons is expressed in the Policy Statement that the Ninth Circuit appended to its opinion in this case. The Bureau encourages news media access to all prisons "to insure a better informed public." Reporters may freely use cameras and tape

recorders, talk to randomly encountered prisoners, conduct interviews, etc.[11/]

4. Experience of other news reporters.

The evidence before the district court also included unsuccessful attempts by other news reporters to cover stories at the Alameda County jail (A. 16-18, 63-64; Tr. 207-210). One who wished to investigate reported gang rapes and suicide spoke personally with Sheriff Houchins, who excluded him from the jail. The sheriff gave no reason except that it was his "policy" not to allow entry (Tr. 208-9). The reporter also tried to go on the first guided tour of the jail in July, 1975. He promptly signed up but was removed from the list when someone in the sheriff's office decided that more members of the public and fewer members of the press would be permitted to go (Tr. 209-10).

5. The district court's order.

Finding that the requirements for a preliminary injunction were met, the district

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11/ As the Policy Statement indicates, the Bureau has completely abandoned the press restriction it defended as essential to security in Saxbe v. Washington Post, 417 U.S. 848 (1974).

court enjoined the sheriff, during the pendency of this suit, from excluding the press "as a matter of general policy" (A. 71). The order directed that reporters be given access "at reasonable times and hours" for the purpose of providing news coverage of jail conditions. Deferring to the sheriff's administrative discretion, the court provided that "the specific methods of implementing" access were to be "determined by Sheriff Houchins" (A. 70). Further, the order expressly stated that the sheriff may "in his discretion" deny all access "when tensions in the jail make such media access dangerous" (A. 71).

The sheriff sought and was granted a temporary stay to develop specific procedures covering such matters as searches of reporters and their equipment, proper identification of press representatives, instructions as to items that could not be photographed, consent forms for interviews, etc. (R. 66-68, 74). The sheriff represented that he needed eight working days for this purpose (R. 67).

SUMMARY OF ARGUMENT

Conditions in the Alameda County jail have been of particular public concern in

recent times. County citizens need to be informed in order to make intelligent decisions about publicly-determined jail issues, including whether the sheriff's performance merits his re-election. KQED, the local public television station, seeks to meet this public need by reporting jail conditions and events. Its activity and the public's right to receive the information are complementary interests protected by the First Amendment.

I.

Respondents seek, and the district court authorized, substantially the same press access to the county jail as was in fact permitted by the institutions in Pell v. Procunier and Saxbe v. Washington Post Co. The Court's statement in Pell-Saxbe, to the effect that newsmen have no special access to information not shared by the public generally, must be read in context. The prisons in those cases permitted very substantial press access, reasonably sufficient to insure against concealment of conditions or events of public concern. The sole restriction was a rule against journalists designating individual prisoners for interviews. The Court found this narrow restriction

justified by evidence of security risks existing at the time. The restriction took the form of duly considered departmental and federal regulations, tailored to a particular situation and entitled to certain deference. In contrast, petitioner's "policy" needlessly shuts off inquiry into official conduct and conditions in a local jail whose largest category of detainees are charged with driving offenses.

This case does not involve any attempt to probe into confidential information or sensitive executive or judicial deliberations. Nor do respondents contend that the sheriff has any affirmative duty to turn over information to the press. But he may not bar attempts by reporters to seek out non-confidential information simply by erecting an identical bar to the public generally.

Adopting petitioner's position as a constitutional rule -- that in no circumstances are reporters entitled to different access than the general public -- would authorize him completely to exclude the press, as he did until this suit was filed, provided only that he also excludes the general public. It would sanction the concealment of jail conditions that gave

rise to this suit. Access to the tax-supported jail run by an elected sheriff is not a privilege to be granted or withheld simply as petitioner pleases, without regard to the existence of any solid state interest. Access substantially like that permitted in Pell-Saxbe is the minimum needed to get timely and complete information to the public. It represents a reasonable accommodation between, on the one hand, press or public access at will and, on the other, arbitrary exclusion unduly constricting the flow of information to the public.

Reasonable "time, place and manner" restrictions can be implemented. But there are good reasons why such restrictions should not be identical in all circumstances for the press and the general public. In one respect, the sheriff can impose greater restrictions on reporters than he imposes on the touring public, as he can insist on proper credentials, can screen them and can search them and their equipment. In other respects, lesser restrictions are required, for there is a valid distinction between the right to the information sought and the means of physical access to it. The press and the general public have equal rights to

non-confidential information. But both the purposes of access to the information and the practical problems involved call for differences that the law ought not to ignore. Neither the holding of Pell-Saxbe nor sound policy requires that press and general public access be blindly equated regardless of the circumstances.

II.

The sheriff's access restrictions were demonstrated to be far greater than necessary to protect any substantial governmental interest. The district court found on ample evidence that jail security would not be threatened by reasonable access. Nor does limited access on reasonable notice by reporters entail the administrative disruption that the sheriff asserts is caused by his cumbersome "tours." Prisoner interests in privacy are easily protected. The record affirmatively shows that none of petitioner's expressed concerns is in fact a problem. There is no reason why the sheriff cannot provide substantially the same access as routinely provided by the other jails and prisons in the area.

III.

The sheriff's mail, visiting and

telephone rules governing prisoners do not serve the same purposes and cannot conceivably meet the public need for information on jail conditions. The periodic guided tours for the general public disclose certain plant and equipment to the handful of citizens who can journey to the remote jail to take the tours. But they are basically irrelevant to the need to report events and get timely information to the public at large.

ARGUMENT

Introduction

"[C]onditions in this Nation's prisons are a matter that is both newsworthy and of great public importance." Pell v. Procunier, 417 U.S. 817, 830 n.7 (1974).[12/] Jail and

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12/ Noting that conditions in similar institutions "are of great interest to the public generally," Judge Mansfield has elaborated as follows:

> "Such public interest is both legitimate and healthy. Quite aside from the fact that substantial sums of taxpayers' money are spent annually on such institutions, there is the necessity for keeping the public informed as a means for developing responsible suggestions for improvement

prison conditions are of public concern not simply when they result in riots, disturbances, escapes, tragic fires, suicides and the like, but also when a new facility is planned or innovative program developed. Jails and prisons are, after all, public institutions. They cost a great deal of tax money to build and operate. But unique among public institutions, they exist for the purpose of involuntarily confining and isolating certain citizens; their very invisibility presents the risk of abuse of individual liberties.13/

12/ continued.

> and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests." Cullen v. Grove Press, Inc., 276 F.Supp. 727, 728-29 (S.D.N.Y. 1967); see also Nolan v. Fitzpatrick, 451 F.2d 545, 547 (1st Cir. 1971).

13/ In contrast, "The openness of the public school and its supervision by the community afford significant safeguards against the kind of abuses from which the Eighth Amendment protects the prisoner." Ingraham v. Wright, ___ U.S. ___, 97 S.Ct. 1401, 1412 (1977) (emphasis added). In Ingraham, the Court decided that although the Eighth Amendment protects prisoners, public school students do not need its protection from corporal punishment.

Conditions in Alameda County's jail have been of particular public concern in recent times. First, a federal court determined that conditions in one facility were so "shocking and debasing" as to violate the Eighth Amendment.14/ Then there were the suicide in that facility and the related developments that led to this suit, raising serious questions about jail conditions and compliance with court orders (pp.5-6, supra). Finally, during all this period the county has been debating whether and where to build new jail facilities costing many millions of dollars. The sheriff is elected by the public in Alameda County. It may not be in his self-interest to have public attention focused on matters he considers unfavorable, but county citizens, like the NAACP respondents in this case, should not be deprived of information necessary to assess his performance or to make intelligent decisions on publicly-determined jail issues. KQED, the local public television station, would like to meet this public need for information, by gathering and publishing

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14/ Brenneman v. Madigan, 343 F.Supp. 128, 132-33 (N.D. Cal. 1972). The decision, requiring extensive relief, was not appealed.

it. Mr. Justice Stevens, concerned about "inadequate public awareness of the nature of our penal system," has pointed out that: "from the standpoint of society's right to know what is happening within a penal institution, it is perfectly clear that traditional First Amendment interests are at stake." Morales v. Schmidt, 489 F.2d 1335, 1346 & n.8 (7th Cir. 1973).

Respondents' First Amendment interests are complementary --the right of the public to receive the information, and the right of the press to seek it out. First Amendment protections for gathering and publishing news "are not for the benefit of the press so much as for the benefit of all of us." Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); see also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975). At stake in gathering information on jail conditions is the "right of the public to receive such information". Pell v. Procunier, supra, 417 U.S. at 832. The recipient's right, grounded on the First Amendment, has often been recognized.15/ As the Court said in a related

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15/ See Pell, supra, at 832; Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 756 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972); Red Lion Broadcasting

context, the addressee of a communication from prison has a First Amendment right against "unjustified governmental interference with the intended communication." Procunier v. Martinez, 416 U.S. 396, 409 (1974).

Regarding KQED's interest, the Court has acknowledged that "Without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972). As Mr. Justice Stewart explained,

> "The full flow of information to the public protected by the free press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated . . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised." Id. at 727, 728 (dissenting opinion).16/

15/ continued.

Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965); Thomas v. Collins, 323 U.S. 516, 534 (1945).

16/ Mr. Justice Stewart has also pointed out that the First Amendment's freedom "of the

Thus, the Court has recognized that "Newsgathering is not without its First Amendment protections." Id. at 707; Pell v. Procunier, supra, 417 U.S. at 833.17/

The present case involves the extent to which citizens are entitled to learn, through their local press, what is happening in their county jail.

16/ continued.

press" clause is unique -- the press is the only nongovernmental organization explicitly given constitutional protection. Stewart, "Or of the Press", 26 Hastings L.J. 631, 633 (1975).

17/ See also Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Lewis v. Baxley, 368 F.Supp. 768, 775 (M.D. Ala. 1973) (three-judge court); Note, The Right of the Press to Gather Information, 71 Col. L. Rev. 838 (1971); Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505 (1974). Long ago the Court affirmed that the First Amendment was not designed merely to prevent censorship of the press but also "any action of the government by means of which it might prevent such free and general discussion of public matter as seems absolutely essential to prepare people for an intelligent exercise of their rights as citizens." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (quoting Judge Cooley). See also Mills v. Alabama, 384 U.S. 214, 219 (1966); New York Times Co. v. United States, 403 U.S. 713, 717 (1971).

I. The Decision Below Is Consistent With Pell v. Procunier And Saxbe v. Washington Post.

Respondents seek, and the district court authorized, substantially the same press access to the county jail as was in fact permitted by the institutions in Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

Petitioner Houchins has never contended that county citizens have no right to be informed of jail conditions or that KQED is without First Amendment protection in seeking out the news. Instead, he points to the following statement in the Pell and Saxbe opinions:

> "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. . . . The Constitution does not. . .require government to accord the press special access to information not shared by members of the public generally." Pell v. Procunier, supra, 417 U.S. at 834; Saxbe v. Washington Post Co., supra, 417 U.S. at 850.

Based on this statement,18/ the sheriff argues

18/ The Court's sole reliance for this proposition in Pell-Saxbe was on Branzburg v. Hayes,

that it is irrelevant whether his restrictions needlessly frustrate reporting of jail conditions -- all he has to do is mechanistically equate KQED's rights with those of the public in general, wholly excluding both or limiting both to guided tours. But the holdings of Pell and Saxbe do not require this result. Nor does sound policy.

18/ continued.

408 U.S. 665 (1972). The opinion in Branzburg contained a similar statement, but all the case held was that a newsman had no constitutional privilege to resist testifying before a grand jury investigating crime of which he had knowledge. As the Court noted in Branzburg, "The sole issue before us is the obligation of reporters as other citizens to respond to grand jury subpoenas relevant to an investigation into the commission of crime." 408 U.S. at 682 (emphasis added). The Court also pointed out that (unlike the situation here) its holding involved "no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire" Id. at 691 (emphasis added). The Branzburg "access" dictum in turn relied on Zemel v. Rusk, 381 U.S. 1 (1965). In Zemel the Court held that a citizen did not have a constitutional right to have his passport validated for travel to Cuba. "[T]he weightiest considerations of national security," 381 U.S. at 16, militated against this asserted right. There was no issue whatever as to the rights of the press.

The sole restriction on access upheld by Pell and Saxbe was a prison rule against the press designating specific inmates for interviews. The Court's "no special access to information" statement must be read in the context of prisons that already permitted very substantial press access. Thus, the Court expressly pointed out in Pell that "both the press and the general public are accorded full opportunities to observe prison conditions." 417 U.S. at 830 (emphasis added). After noting that the prisons conducted regular tours for the public, the Court found that "In addition, newsmen are permitted to visit both the maximum and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter." 417 U.S. at 830 (emphasis added). Newsmen were permitted "to enter the prisons to interview" randomly selected inmates, and to observe program group meetings and interview the participants. Id. The same was true in Saxbe. There, the Court noted that "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there." 417 U.S. at 847. In addition,

newsmen were permitted to tour and photograph any prison facilities and interview inmates they encountered. Id. at 847, n.5.

Indeed, in both cases press access to the prisons involved was substantially broader than that of the general public, as the Pell opinion emphasized no less than three times, 417 U.S. at 830-31, 831 n.8, 833, and Saxbe twice, Id. at 847, 849. (Public access was limited, as here, to correspondence, visitation and guided tours.)

In short, the no-interview rule in Pell and Saxbe was upheld only on a record showing that reporters in fact had substantial access to the prisons, access reasonably sufficient to insure against concealment of conditions or events of public concern.[19/] As the district

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19/ The same was true in Garrett v. Estelle, ___ F.2d ___, No. 77-1351 (5th Cir. Aug. 3, 1977), where a television cameraman sued for the right to film an execution from the execution chamber. Far from concealing the event, the state authorized Associated Press and United Press reporters actually to be present in the execution chamber and to act as press pool representatives; it also made facilities available for other press corps members to view a simultaneous closed circuit telecast; and it authorized interviews of death row inmates. This access assured coverage of the grisly

court noted in the present case, the Pell-Saxbe access is precisely the same sought by KQED. Thus, KQED can be granted all the relief it seeks and it will have no more access than the press had in Pell-Saxbe.[20/] The district court order is consistent with the holdings in those cases.[21/]

19/ continued.

event itself; the court simply upheld a narrow restriction on the manner of coverage.

20/ In his opinion on petitioner's stay application, Mr. Justice Rehnquist stated that "concededly the access of the public and the press to the Alameda County jail is less than was their access to the California prisons in Pell" (Appendix to Petition for Certiorari, p. 37), and noted the possibility that the Pell and Saxbe "no special access" statement would not necessarily be dispositive if "impliedly limited to the situation where there already existed substantial press and public access to the prison" (Id. at 38). We contend that Pell and Saxbe do not control for this reason and because of the other distinctions and policy considerations that follow.

21/ Part of the district court's order here does authorize "inmate interviews," without further definition (A. 71). This was clearly meant to authorize the same kind of random or anonymous interviews permitted in Pell and Saxbe (A. 69). The sheriff permits interviews of specifically designated pretrial detainees

Moreover, the narrow no-interview restriction in Pell-Saxbe was supported by evidence in both cases of security risks existing at the time -- undue attention to "big wheels" who had gained notoriety and influence over other prisoners.[22/] The restriction was a measured response to particular violent episodes. It took the form of duly considered departmental and federal regulations aimed at a particular problem. Here, in contrast, the jailer's restrictive "policy" is not specifically authorized by any statute or regulation, or tailored to any emergency. It can be altered by the moment as the sheriff pleases. It is not entitled to great deference.

In addition, the local county jail is a different kind of institution from the prisons involved in Pell and Saxbe. Instead of confining felons, many of whom are recidivists convicted of very serious crimes, the county jail

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21/ continued.

(but not sentenced prisoners), provided that reporters obtain formal consents (A. 30).

22/ As noted above (nn. 10,11, supra), the institutions involved in Pell and Saxbe have since abandoned their "no-interview" rules.

has only pretrial detainees and persons convicted of misdemeanors or serving short felony terms. According to the sheriff's evidence, the largest number of pretrial detainees at the jail are charged with driving offenses, including drunk driving (28%); drug charges account for 14%; only 7% are charged with assault, 6% with burglary and 2% with robbery (D.Exh.F, last page). Apart from the different kind of security risks in the prisoner population, the penal interests of deterrence and rehabilitation, mentioned in Pell, have no application to pretrial detainees, who have not been convicted of any crime.

This case does not involve an attempt to acquire confidential "information not shared by members of the public generally." Pell, supra, at 834. KQED does not assert any right to probe into matters that should properly be secret or confidential, such as sensitive executive or judicial deliberations. Its reporters do not seek to observe security staff conferences or inspect riot control plans.[23/] These

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23/ Similarly, KQED does not complain of being "regularly excluded from grand jury proceedings, [the Court's] own conferences, the meetings of other official bodies in executive

are instances in which government has a need to keep the information confidential, while in the present case there is a need to have the information on jail conditions made public. We recognize, with Mr. Justice Stewart, that the First Amendment itself is not a Freedom of Information Act, requiring "openness from the bureaucracy." Stewart, Or of the Press, 26 Hastings L.J. 631, 636 (1975). KQED therefore does not contend that the sheriff has any affirmative duty to turn over information to the press, make himself available to explain policy, open his files to inspection, or even notify the press

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23/ continued.

session, and the meetings of private organizations." Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972); see also Trimble v. Johnston, 173 F.Supp. 651 (D.D.C. 1959) (reporter not entitled to inspect confidential government payroll records). Nothing about a jail cell represents either a deliberative or confidential government function. Branzburg's additional comment that "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded" (Id.), refers to emergencies. This is not an issue in the present case because the district court order expressly acknowledges the sheriff's power to deny all access if he thinks jail tensions would make access dangerous.

of important occurrences.24/ But he cannot bar attempts by news reporters to seek out non-confidential information simply by erecting an identical bar to the public generally.

Adopting petitioner's position as an inflexible constitutional principle -- that in no circumstances are reporters entitled to different access than the general public -- would authorize him completely to exclude the press, as he did until this suit was filed, provided only that he also excludes the general public. It would sanction the concealment of jail conditions that gave rise to this suit, and deprive the electorate of information necessary to evaluate the conduct of the elected sheriff's office. The guided tours could be swiftly cancelled. The sheriff could at his whim impose a total information blackout, regardless of whether there is any justification in terms of jail security or any other valid penal interest.

24/ Federal and California prisons are required by regulation promptly to inform the press of any newsworthy event and permit reporters to cover the story. Federal Bureau of Prisons, Policy Statement 1220.1 B, sec. (f)(1) (Appendix to Petition for Certiorari, p. 12); California Department of Corrections, Administrative Manual, §415.08 (P. Exh. 3; Tr. 144-49).

Giving this kind of unfettered discretion to any public official is plainly inconsistent with safeguarding First Amendment interests.25/

The Court should firmly reject the sheriff's notion that access to the tax-supported county jail, by either press or individual members of the public, is a privilege to be granted or withheld as he pleases. His position is not sanctioned by California case

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25/ See generally Southeastern Promotions Limited v. Conrad, 420 U.S. 546, 553 (1975); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969); Main Road v. Aytch, 522 F.2d 1080, 1098 (3d Cir. 1975). In Procunier v. Martinez, 416 U.S. 396, 415 (1974), the Court remarked that "Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism."

law26/ or statutes,27/ or by this Court's

26/ The California case most directly in point acknowledged that a sheriff may "reasonably regulate the operation of the jail" but held that even a convicted felon, who was serving as an attorney's investigator, was entitled to visit the jail because there was "no showing. . .that the. . .visits to the jail cannot be so handled as to avoid endangering security." Clifton v. Superior Court, 7 Cal.App.3d 245, 255 (1970). Mathis v. Appellate Department, 28 Cal.App.3d 1038 (1972), held that jail officials may restrict visitation "in ways reasonably consistent with the security of the facility." Id. at 1041. Davis v. Superior Court, 175 Cal.App.2d 8 (1959), held that "reasonable" rules on prison communication are permissible. Id. at 19-20. Yarish v. Nelson, 27 Cal.App.3d 893 (1972), like Pell, upheld a narrow rule against a press interview of a specific prisoner. In doing so, the court followed what it called a "reasonableness" test, based on United States v. O'Brien, 391 U.S. 367 (1968), discussed at p. 44, infra.

27/ Cal. Govt. Code §26605 simply says that "The Sheriff shall take charge of and keep the county jail and the prisoners in it." Various Penal Code provisions make it a crime to communicate with a prisoner without permission of the officer in charge (§4570); to use false identification to gain admittance (§4570.5); if a former convict, to come on the grounds without consent (§4571); and, if a tramp or vagrant, to come on the grounds and communicate with a prisoner (§4572).

decisions.[28/] Nothing authorizes him needlessly to shut off inquiry into jail conditions. Access substantially like that permitted in Pell-Saxbe is the minimum needed to get timely and complete information to the public. It represents a reasonable accommodation between, on the one hand, press or public access at will and, on the other, arbitrary exclusion unduly constricting the flow of information to the public.

Reasonable "time, place and manner" restrictions can of course be implemented. But there are good reasons why such restrictions should not be identical in all circumstances for the press and the general public. A valid distinction may be drawn between the right to

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28/ Saxbe v. Washington Post Co. does mention the "truism that prisons are institutions where public access is generally limited," 417 U.S. at 849, but does not specify what the limitations are. Adderly v. Florida, 385 U.S. 39 (1966), simply upheld trespass convictions of students who conducted a demonstration that actually blocked the jail entrance used to transport prisoners. 385 U.S. at 45. The lower court decisions cited by the sheriff (Petitioner's Opening Brief, pp. 26-27) do not involve jails at all. They simply recognize, as we do, that not every public building is required to serve as a "forum" for protests and demonstrations.

the information sought and the means of physical access to it. The press and the general public have equal rights to non-confidential information. But when it comes to physical access to the information, both the purposes of access and the practical problems it presents call for differences that the law ought not to ignore.[29/]

It is impractical to have free access for the general public randomly to inspect jail facilities. Both their numbers and their unpredictability weigh in favor of organized, controlled, periodic access like petitioner's tours. This is especially true where, as here, the sheriff does not take the precautions of requiring members of the public to present any identification, submit to any screening, state

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29/ As Judge Hufstedler pointed out below, "it does not follow that regulations that are reasonable under the circumstances as applied to touring groups of the public are also reasonable as applied to new media personnel. . . . Guided public tours and news media access do not serve identical purposes nor do they involve identical practical problems." (Appendix to Petition for certiorari, p. 25). Judge Duniway similarly found the administrative problems "obviously" different and reasoned that "the law ought to recognize the differences" (Id. at 22).

any purpose for wanting to view the jail or be searched (Tr. 75). But under the district court's order, the sheriff can insist on proper identification of reporters, screen them and search them and their equipment. In this specific respect, the sheriff can reasonably impose greater restrictions on reporters than on the general public.

But less restrictive provisions are also required. Aside from the practical differences justifying different kinds of access, press and public have different purposes for going to the jail. Members of the general public may wish to see the jail for some personal reason, or out of idle curiosity. But reporters go for reasons unique to the function which the press performs on behalf of the public--to cover events of public interest, and to gather and publish information on jail conditions. They serve as the "eyes and ears" of the public at large. To fulfill this purpose, they need access at least approximating that permitted in Pell-Saxbe. Reporting of news events, in particular, cannot await next month's public "tour."

The only way the public at large will be informed of conditions at the Alameda County

jail is through the press. The jail is located in a remote corner of the county, almost an hour's drive from the population center of Oakland (Tr. 55), and practically inaccessible by public transportation. Without reasonable press access, taxpayers and voters will remain ignorant of jail conditions and unable intelligently to decide on publicly-determined issues of jail policy. As Judge Duniway pointed out below,

> "[I]n our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about the public's business. Witness 'Watergate' and its remarkable consequences." (Appendix to petition for certiorari, p. 22).

This Court has noted the same reality:

> "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

Mr. Justice Powell, agreeing that "for most citizens the prospect of personal familiarity with

newsworthy events is hopelessly unrealistic," sees the press acting as the "agent" of the public at large. Saxbe v. Washington Post Co., supra, 417 U.S. at 863 (dissenting opinion). In this representative capacity the press can, with reasonable but somewhat different access than the general public, satisfy the public need for information without undermining any substantial governmental interest.30/

30/ See also Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505, 1522 (1974). A California prison official, preferring that the press act as agent for the public instead of relying on public tours, put it this way:

"A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the president of the local Ladies' Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs. The media does a good job of reporting in most instances, and prison administrators should have no qualms about admitting responsible reporters to view prison activities and to interview men in these programs." Park, On Being Medium Nice to Prisoners, Wash. U.L.Q. 607, 615 (1973).

In summary, neither the holding of Pell and Saxbe nor sound policy requires that identical time, place and manner restrictions be imposed on press and public. Freedom "of the press" need not be defined in all circumstances by the rights of the public at large. If the Free Press guarantee meant no more than every citizen's right of Free Speech, "it would be a constitutional redundancy." Stewart, "Or of the Press," 26 Hastings L.J. 631, 633 (1975).

II. The Sheriff's Access Restrictions Are Far Greater Than Necessary To Protect Any Substantial Governmental Interest.

As discussed above, Pell and Saxbe do not require that the means of press and general public access to information be blindly equated regardless of the circumstances. Rather, the decisions in those cases followed from application of a traditional First Amendment test -- whether the particular restriction on First Amendment activity was in fact justified by an important governmental interest. Since there was evidence that prison security was actually endangered (at least at the time) by designating individual prisoners for interviews, and since the narrow no-interview rule did not constrict

the otherwise free flow of information through the press, the Court upheld the rule.

In other words, Pell and Saxbe did not mark a departure from settled First Amendment principles. Under those principles, a jailer's restriction on First Amendment interests is justified only if, first, the restriction furthers "an important or substantial governmental interest unrelated to the suppression of expression," and second, the limitation of First Amendment freedoms is "not greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. 396, 419 (1974). See also United States v. O'Brien, 391 U.S. 367, 377 (1968); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960).31/

In the present case, the district court

31/ In Linmark Associates, Inc. v. Township of Willingboro, ___ U.S. ___, 97 S.Ct. 1614, 1619 (1977), the Court acknowledged that an ordinance might serve an important purpose but, absent evidence that it was necessary to that purpose, held that city officials could not restrict "the free flow of truthful information." The sheriff agrees that United States v. O'Brien, supra, states the correct test (Petitioner's Opening Brief, p. 20), but fails to apply it to the facts of this case.

found that the sheriff's access restrictions were greater than necessary to protect any important interest. Apart from the bland generality that the district court should have shown more "deference" to the sheriff because the problems "are not amenable to solution by judicial decree,"32/ petitioner advanced three kinds of interests alleged to justify his restrictions:

32/ This is not a "prisoners rights" case involving the knotty problems of daily confrontations between keepers and kept. We recognize that courts must consider the views of corrections officials, as the district court indeed did in this case. But appropriate concern for their views "cannot encompass any failure to take cognizance of valid constitutional claims. . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." Procunier v. Martinez, 416 U.S. 396, 405 (1974) (First Amendment and due process protection for outsider-prisoner communication); see also Bounds v. Smith, ___ U.S. ___, 97 S.Ct. 1491 (1977) (prisoners' access to courts); Estelle v. Gamble, ___ U.S. ___, 97 S.Ct. 285 (1976) (prisoner medical care); Wolff v. McDonnell, 418 U.S. 539 (1974) (procedural due process protection against in-prison punishment); Cruz v. Beto, 405 U.S. 319 (1972) (First Amendment, equal protection); Lee v. Washington, 390 U.S. 333 (1968) (equal protection). No decision of this Court indicates that the views of a county jailer are entitled to unquestioning acceptance.

(1) jail security; (2) avoidance of disruptions caused by unscheduled "tours," and (3) protection of inmate privacy and against undue pretrial publicity.

1. Jail Security.

Jail security is certainly a legitimate interest. But the district court found on more than ample evidence that restricting access in the way the sheriff does is not necessary to protect jail security and that access like that routinely afforded in other prisons and jails in the area would not jeopardize security (A. 69). The sheriff has not challenged, nor could he challenge, the district court's findings as clearly erroneous. Fed. R. Civ. P.52. There is "substantial evidence in the record" demonstrating that petitioner has "exaggerated" security concerns. See Pell v. Procunier, supra, 417 U.S. at 827.[33/] And in any event the district court's order expressly acknowledges the sheriff's authority to refuse all access if jail

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33/ As for any purely subjective anxiety the sheriff may have, "in our system, undifferentiated fear or apprehension of disturbance is not enough" to restrict First Amendment rights. Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969).

tensions might threaten security (A. 71).

Although access alone would not endanger security, petitioner's brief asserts that permitting photography would create a risk because there are alarm and locking devices in the jail which should not be photographed. Petitioner has not suggested who might disobey instructions not to photograph them, or why. This matter was never mentioned when the sheriff excluded KQED and others from any access (Tr. 172,209). But in any event prisoners themselves can at their leisure sketch the devices in detail, as pointed out by the district court (A. 69; Tr. 117). Further, prisons like San Quentin of course have sophisticated security devices, and they have no problems in permitting news photography, even in maximum security sections (Tr. 147-48, 150). Filming news coverage in numerous jails and prisons is routinely done without resultant security problems (Tr. 167-71, 196, 216; A. 10, 13, 14-15, 64-65, 69). News photography was permitted in the institutions involved in Pell and Saxbe. Finally, petitioner testified that he would have no problem with newsmen using cameras on a press tour, as opposed to a public tour, "as often as the court

might deem suitable" (Tr. 111-12, 116). In short, while the sheriff may determine that certain limitations on camera use are reasonably required, an absolute ban on cameras is not dictated by jail security.

2. Disruption by unscheduled "tours".

The sheriff's most frequently-expressed concern is the inconvenience that press "tours" might cause if provided "on demand". Thus his brief emphasizes several times that "tours" disrupt the "tight schedule" of inmate movements during the day and cause related administrative difficulties. He says that during a tour "inmates must be locked in their cells or otherwise removed from contact with the visitors" and that therefore jail movements "come to a halt" (Id.).

But all of this is built entirely on petitioner's own notion that any access necessarily involves a cumbersome "tour." Nothing could be further from reality, as the sheriff well knows. The interest of KQED is not in having "tours", and the district court order does not require any such thing. Conducting unwieldy guided tours was solely the sheriff's idea. KQED's main interest is in being able to cover

events of public interest as soon thereafter as access can safely be provided. This involves the opportunity for a reporter to spend a few minutes at the scene (e.g. the escapee's hole in the fence, the charred remains of the dormitory, the new basketball court, the bleak cell where the suicide took place, etc.). This does not require locking up inmates or delaying any inmate movement at all.[34/] Access for a specific and limited purpose does not involve any "tour." Nor does it entail any disruption, or doing anything different from what the record shows is the routine practice in the other local jails and prisons, i.e., access on reasonable notice to cover a particular event.[35/]

The district court's order, providing

34/ A large number of civilians -- social workers, investigators, teachers, butchers, bakers, nurses, religious counselors -- come and go within and around the jail every day, without prisoners being locked up or normal movements stopping (Tr. 68-71).

35/ Nor is there likely to be any deluge of press requests. When San Quentin first opened its notorious maximum security section to reporters there was some initial interest, but no requests at all in the two months before the hearing in this case (Tr. 151-52).

for access "at reasonable times and hours" and authorizing the sheriff to lay down the ground rules for such access, fully protects the sheriff's interest in avoiding administrative disruption.

3. Inmate privacy and pretrial publicity.

The sheriff's professed concern for protecting the privacy of the prisoners does not justify denial of access. The evidence shows that KQED and other press representatives do not photograph or interview prisoners without their consent (A. 11; Tr. 150, 170-71, 201-2), and the sheriff is free to make this a firm and formal requirement. Although petitioner also claims a desire to protect detainees awaiting trial from pretrial publicity, this is a red herring. In the first place, he in fact permits photographs and interviews of pretrial detainees, regardless of any security or publicity problems, provided only that formal consent is obtained (Tr. 89, 91, 97, 118). In the second place, the right to a fair trial is the right of the accused, not the jailer. See Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976); Chicago Council of Lawyers v. Bauer,

522 F.2d 242, 250 (7th Cir. 1975), and cases cited. The sheriff is not under any duty to prevent pretrial statements.[36/] Nor can he be permitted to use a "pretrial publicity" claim to suppress prisoner statements about the conditions of their confinement -- the subject of this suit.

Finally, the record affirmatively shows that none of the sheriff's objections is in fact

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36/ On the contrary, jailers sometimes collect pretrial statements for use against the criminal defendant. See, e.g. Lanza v. New York, 370 U.S. 139 (1962). The "fair trial-free press" decisions relied on by the sheriff are not in point. In Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975), the court merely upheld a rule against taking photographs in a courthouse, pointing out that the rule was intended to insure a fair trial for defendants. (In addition, the photographer had in fact created an actual disturbance at the courthouse, and had taken pictures of prisoners without their consent.) Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958), upheld the same rule against taking photographs in and around the courtroom. Estes v. Texas, 381 U.S. 532 (1965), and Sheppard v. Maxwell, 384 U.S. 333 (1966), simply recognize the right of a criminal defendant not to have a massively publicized trial. All these fair trial cases emphasize the accused's right to a dignified and deliberative judicial setting. They do not apply to inquiries into conditions at a jail.

a problem. The record includes the experience of other jail and prison administrators and the considered opinion of experts in the field. The Sheriff of San Francisco County (Tr. 189-203) and the San Quentin official (Tr. 143-65) dealt in concrete detail with all of petitioner's objections -- security, administrative disruption and privacy. They demonstrated that admitting reporters on reasonable notice did not present any problems whatever. Finally, the experience of KQED and other reporters in covering events on the premises of many other jails and prisons shows that they can be permitted to do their newsgathering job without interfering with any valid correctional interest.[37/]

Thus, unconvinced that reasonable press access would harm any interest of the sheriff, the district court properly granted a preliminary injunction, and the Court of Appeals unanimously affirmed. Petitioner has presented no

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37/ There is also the expert judgment of national authorities in the field -- the standards of the National Advisory Commission on Criminal Justice Standards and Goals, and the Policy Statement of the Federal Bureau of Prisons (see pp. 14-15, supra) -- providing for open news access to correctional institutions.

reason why this Court should disturb the decisions below.

III. The District Court Properly Found That The Sheriff's "Alternative Means of Communication" Do Not Serve The Same Purposes Or Meet The Public Need for Information On Jail Conditions.

Petitioner has been busily improving his public relations image at each stage of this litigation. Before he was sued, the sheriff's "policy" was clear and unequivocal -- complete exclusion of both press and public.[38/] When suit was filed, petitioner quickly announced the series of six monthly tours, as well as liberalized mail and visiting rules (A. 28-31). When it was brought out at the hearing on the preliminary injunction that the tours were completely booked within a week and so there was no other press or public access for the rest of the year (Tr. 116-17; see p. 7, supra), the sheriff announced that he wished to continue the tours for the next six months, and possibly

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38/ Further, his jail rules provided for censorship of all correspondence, even letters of pretrial detainees, and forbade prisoners to mention the "names or actions" of any guard or other official (A. 19). Compare Procunier v. Martinez, 416 U.S. 396 (1974).

beyond, although he had not yet presented the proposal to the Board of Supervisors (Tr. 81-82). He also testified that he would be willing to hold special tours for the press, with their cameras and with random interviews, "as often as the court might deem suitable" (Tr. 111-12, 116). (The Sheriff has never explained why no such press tours have been announced or carried out.) When the district court issued a preliminary injunction, petitioner in his stay application declared that public tours would then be held twice monthly and offered to have photographs taken of scenes that had been conspicuous by their omission ("appendix" to Petitioner's Opening Brief, p. 2-3).39/

39/ Most recently, in his petition for certiorari to this Court (p. 9), he asserted that reporters were occasionally being let in the jail for news coverage of "special events" like fires and escapes. The sheriff was apparently deciding for himself what was "news" and either allowing or disallowing access. While this "spot news" contention has disappeared from petitioner's brief on the merits, KQED vigorously denies that it is being allowed access to the jail to cover news events, and we have never seen any rules or policy statements authorizing such coverage. (Information about a recent women's riot did not leak out to the public until nearly two weeks after the event. See Appendix to Brief in Opposition to Petition for

Here, much of the sheriff's brief is devoted to descriptions of prisoner mail, visiting and telephone rules, in addition to the guided tours. These are said to provide substantial access to jail prisoners, or by jail prisoners to outside persons. Petitioner's argument derives from the discussion in Pell of "alternative means of communication" available to prisoners. 417 U.S. at 823. The sheriff misses the point, however, because the Pell opinion shows that alternative means were relevant only to the prisoners' asserted right to be interviewed by reporters, not to the journalists' asserted First Amendment interests. The Court declined to declare a new and unusual prisoner's

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39/ continued.

Certiorari.) Even if the sheriff's assertion on "special event" coverage were true -- a matter this Court should surely not attempt to determine -- such ad hoc and standardless granting of special access would itself be constitutionally suspect as permitting discrimination on the basis of "the content of the expression." Pell v. Procunier, supra, 417 U.S. at 828; see also Southeastern Productions Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969); Main Road v. Aytch, 522 F.2d 1080, 1098 (3d Cir. 1975).

right when there were both proven security dangers and alternative ways for a prisoner to reach an outside ear. Even the existence of adequate means of reaching outsiders was not in itself conclusive of the prisoner's right. Pell, supra, 417 U.S. 823-24; see also Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). Compare Linmark Associates, Inc. v. Township of Willingboro, ___ U.S. ___, 97 S.Ct. 1614, 1618 (1977), where the Court unanimously rejected an argument that an ordinance restricting one means of communication (For Sale signs) was saved by the availability of alternative means (e.g. newspaper advertisements). The Court said, in terms directly applicable here, that there was serious question about the adequacy of the alternative means to serve the intended purpose, and that the alternatives were "far from satisfactory" because they were "less likely to reach persons not deliberately seeking" the information. 97 S.Ct. at 1618. See also Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976), where the Court pointed out that the restrictive prison rules in Procunier v. Martinez, supra, were not saved by the fact that the addressees of prisoner letters

"could have visited the prisoners themselves," and noted that alternative means of reaching intended recipients in other cases did not change the results. 425 U.S. at 757, n.15.

The "alternatives" advanced by petitioner here are not intended to and could not conceivably serve the purpose of providing the public with timely and accurate information on jail conditions and important events there. As to mail, it is wholly unrealistic to expect that jail inmates, confined for a few days in the county jail,[40/] will have either the interest or the ability (many are illiterate) to convey to anyone useful information about conditions at the jail. Almost 75% of the pretrial detainees are in jail for five days or less (D.Exh.F, second page). Even assuming that a prisoner wrote to a reporter, no responsible journalist would publish unsubstantiated information from a prisoner's letter. As KQED's news anchorman testified, there must be an opportunity to get the "other side of the picture," to check the

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40/ According to the Sheriff's evidence, pretrial detainees spend an average of 10 days in the jail, and sentenced prisoners an average of 32 days (Tr. 84-85).

story and to verify any prisoner allegations (Tr. 175, 186). Also, of course, prisoner letters do not give either press or public any opportunity to view the conditions in question.41/

As for visiting, it is most unlikely that reporters (or any specially interested members of the general public) would know any individual prisoner to ask for at the jail. Even if they knew the identity of a prisoner or two, this would be of no help in investigating a particular event. Visiting hours for sentenced prisoners are limited to three hours on Sunday, and most pretrial detainees are hardly in the jail long enough for a visit. Also, of course, visiting a prisoner gives the visitor only a view of the visiting room, not the actual living conditions or the scene of the event at the jail (Tr. 72).42/

41/ Use of the telephone for collect calls has substantially the same defects, even assuming that any news organization accepted collect calls from prisoners.

42/ If a prisoner is a pretrial detainee, the sheriff allows a press "interview," as opposed to a "visit," provided that the reporter obtains the formal written consents of (a) the prisoner, (b) his attorney, (c) the District Attorney and

Perhaps the scene could be viewed on petitioner's next guided tour. That depends on

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42/ continued.

(d) the court having jurisdiction (A. 30). Obtaining all the required consents is both impossibly burdensome and quite unnecessary (absent a proper "gag" order). Let us assume that a detainee wrote a letter to KQED making serious allegations of some wrongdoing at the jail. A reporter could write him back requesting prompt written consent for an interview and the name of his attorney. The reporter could then get the attorney's consent. But for unexplained reasons petitioner requires, in addition, the consent of the District Attorney. And finally, petitioner requires consent of the court. This means that the reporter may have to hire a lawyer (a public station like KQED does not have in-house counsel), and hope to get the matter on the court's busy calendar without undue delay. These additional required consents are solely the creation of the sheriff and are not imposed by any statute, regulation or court decision. Nor, as explained at pp. 50-51, supra, are they necessary to serve any legitimate interest of the sheriff. But they are well calculated to make interviews a virtual impossibility. They hardly promote the "alternative means of communication" claimed by petitioner. And even if an extremely persistent reporter obtained an interview, jail conditions and the scene of the event would still remain hidden from view. (Similar problems attend an attempt to get the facts from a recently released prisoner. Even if a reporter had the extraordinary

whether the guards choose to include it, a matter over which the tourists have no say. And even if it were included, it could not be photographed. Finally, as much as two weeks after the event, the scene might appear as scrubbed and bland as the photographs sold by petitioner.

The problems with the guided tours have been discussed above (pp. 8-10, supra). For a few citizens they do provide a look at the physical plant (with some notable exceptions). But spiriting prisoners out of the way creates an unreal jail, more like a mausoleum. Prohibiting simple questions of randomly encountered inmates cripples understanding of what is seen or what may have happened. Absolutely banning cameras leaves only petitioner's sterile stills of selected buildings and equipment. As Mr. Justice Powell recently said, the public is "the loser" when news coverage is limited to "watered-down verbal reporting, perhaps with an occasional still picture. . . . This is hardly

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42/ continued.

fortune of locating such a person who had knowledge of the event in question, there would be no way to verify his information by checking the scene.)

the kind of news reportage that the First Amendment is meant to foster." Zacchini v. Scripps-Howard Broadcasting Co., ___ U.S. ___, 97 S.Ct. 2849, 2860 (1977) (dissenting opinion).43/

Probably the most serious problem with the tours is their very nature as scheduled and periodic. They are basically irrelevant to the need to cover an event of public concern and get timely and complete information to the general citizenry. The event will not await the next scheduled tour.44/ Exclusion except for the tours necessarily means that important events will be missed, possible abuses suppressed and the public left ignorant of matters of

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43/ 64% of the American public now get most of their news "about what's going on the world today" from television news as opposed to all other sources. The Roper Organization, Changing Public Attitudes Toward Television and Other Mass Media, 1959-1976, 3 (May, 1977).

44/ As Mr. Justice Blackmun reasoned, considering a restriction on reporting by news media, First Amendment interests are infringed each day the restriction continues: "The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." Nebraska Press Ass'n. v. Stuart, 423 U.S. 1327, 1329 (1975).

which they have a right to be informed.

CONCLUSION

"Sunlight is said to be the best of disinfectants." Louis D. Brandeis, Other People's Money, 92 (1914). The district court order would let a little sunlight in the county jail. For the reasons stated above, it should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,
Petitioner,

vs.

KQED, INC., et al.,
Respondents.

Petitioner's Reply Brief

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INTRODUCTION

In this Reply Brief, petitioner Sheriff Houchins ("Sheriff") first corrects misstatements of fact (and misleading implications from correct statements of fact) set forth in Respondents' Brief, and then discusses the legal analysis set out in that Brief.

STATEMENT OF FACTS

A. Inmate Population.

Some of the misstatements of fact by respondents KQED, Inc., and the two local branches of the NAACP (hereinafter sometimes collectively referred to as "KQED") are of little consequence,

asserted only for their prejudicial value. Some of these allegations are taken from the complaint, and were either not the subject of any proof whatever, or were the subject of disputed evidence unresolved by the District Court. Such facts should not be taken as established. For example, it is said that the inmates in the jail are "disproportionately black". (A.4, Respondents' Brief, p. 2) However, the evidence introduced indicates that of the total unsentenced inmates in the stated period, 37.6% were black. (Defendant's Exh. F, R.T. 84-85) Without knowing the proportion of blacks to other races in Alameda County, one cannot say that these fractions show disproportionate numbers of blacks, and there is no evidence on that point. This would be of little consequence in any event: the Sheriff has custody of those sent him by the court. Such remarks are merely inflammatory.[1]

Further, contrary to the evidence Respondents would have the Court believe that the typical inmate is a traffic offender. (Respondents' Brief, p. 33) This is simply not so. The Sheriff's testimony was that in the past most of the inmates were alcoholics and minor misdemeanants, but that today the county jail inmates are as difficult as those in the state prisons. (R.T. 95-97) Felons represented 39% of all bookings, but 70% of the population in custody in 1973. (Defendant's Exh. F. at p. 1) Respondents err in interpreting page 7 of Defendant's Exh. F, which deals with unsentenced inmates only: 28% of all persons booked at Santa Rita were charged with driving (and drunk driving) violations, but those persons served only 5% of the total number of detention days. Most persons booked for these offenses were released, and a significant fraction were booked on additional

1. Similarly inflammatory is Respondents' suggestion that the District Court decided that greater media access was necessary to prevent "concealment" of jail conditions. Respondents' Brief, p. 1. There is nothing in the District Court's Memorandum or Injunction (A.66-71) showing that the Court had determined in any respect that the Sheriff was attempting to conceal conditions.

offenses. These persons served, on the average, only 1.81 days in custody. By contrast, persons arrested for such felony offenses as robbery and "weapons" (concealed weapons or weapons used in the commission of an offense) constituted only 2% and 3% of the bookings, but were held in custody, on the average, 28.19 and 24.86 detention days respectively. (Defendant's Exh. F, p. 7)

B. The Facility.

Respondents allege that in other litigation the District Court had described the conditions at Santa Rita as "shocking and debasing", that the NAACP plaintiffs desired to participate in the public debate on these conditions (A.4-5, Respondents' Brief, pp. 2, 5), and that a psychiatrist who criticized the facility was fired. (A.5, Respondents' Brief pp. 5-6) The facts are: (1) that case mentioned concerned one building at Santa Rita, and that the District Court had dismissed the case (see Petitioner's Opening Brief, p. 9, fn. 4); (2) the only evidence with respect to any debate is that there is public discussion on the question of the proper location of one of the two new replacement jails being constructed, and not on "conditions" in any of the Sheriff's facilities (R.T. 124-126); (3) as to the psychiatrist, the only evidence is that he was fired by the Board of Supervisors (R.T. 186-187) and not by the Sheriff. There is no evidence or testimony, including that of the psychiatrist, as to the reasons for the discharge.

Respondents suggest that the Sheriff's security concerns are fanciful. (See, e.g., Respondents' Brief p. 46) But the evidence shows that security at Santa Rita is sorely overtaxed. Santa Rita is an antiquated military base converted to jail use in 1947 (R.T. 25, 140), and needs direly to be replaced. (R.T. 130) The Sheriff testified that at Santa Rita "security at best is not real good".

(R.T. 86) Indeed it appears that in the five months between the filing of the complaint and the hearing on the preliminary injunction, there were at least three escapes from Santa Rita. (R.T. 132)

C. Other Facilities.

Respondents compare unfavorably the Sheriff's media policies with those of other county jails and of the state authorities at San Quentin. (Respondents' Brief pp. 10-13) In fact, except for San Francisco County,[2] the testimony was that KQED was not aware of the press policies of other counties in California of comparable size to Alameda County: Orange, San Joaquin, San Diego, Sacramento, and Santa Clara. (R.T. 185)

San Quentin State Prison's media policy changes dated from June 1975. (R.T. 148, 158) There were no changes in the program for the public at large, which were described in Petitioner's Opening Brief, p. 24.

San Quentin's definition of "press representative" is rather restricted[3]. (R.T. 162-163; see also Cal. Dept. of Corrections, Admin. Manual, §415.18 (Plaintiff's Exh. 3, R.T. 146)) Even under the new rules for the media, the San Quentin officials would stop an interview when the officials realized that the person being interviewed was a pretrial detainee (R.T. 161; see also Cal. Dept. of Corrections, Admin. Manual, §415.21, fifth paragraph) in fashion similar to Petitioner's rule. (Petitioner's Opening Brief, p. 10, and Petitioner's Reply Brief, § D., "Visits," below.) During the course of the press tour, corrections officials stay very close to the reporters, in order to control their actions. (R.T. 156, 160) The security dangers are so great that equipment

2. The evidence with respect to San Francisco is colored by the obvious political motives and actions of the San Francisco Sheriff, R.T. 194-195, who was far from a neutral reactor to media requests, but rather was a participant in his publicity process. Setting up one of the San Francisco television programs took several visits. (A.13, R. T. 181)

3. The legal questions of just what is the media and who is a media representative are discussed at pp. 11-12 below.

is not only searched but is sometimes furnished. (R.T. 158) Fears of danger from packages, briefcases, and tape recorders in a jail setting are not exaggerated, as San Quentin's own experience demonstrates (R.T. 94), and are part of the Sheriff's concerns as well.

The "spot" coverages described in the state guidelines (see Respondents' Brief, p. 35, fn. 24) are in fact provided by Petitioner. (R.T. 223) These "spots" do not consist of a view of the scene of the incident (cf. Respondents' Brief, p. 49), but rather of access to an official for information. See Cal. Dept. of Corrections, Admin. Manual, §415.08.

D. Visits.

KQED dismisses as inadequate, impractical, or irrelevant the ability to visit inmates. (Respondents' Brief, pp. 58-59) It is nevertheless true that any sentenced inmate can be interviewed by any person, including a member of the press, at visiting times. (A.29-30, R.T. 73, 134, 183-184) Pretrial detainees may be interviewed by media representatives in a private interview, especially set up for the purpose, at which cameras and tape recorders may be used. (R.T. 89)

KQED suggests that the requirement of securing the consents of the inmate, counsel, and the court are unduly burdensome, and it is contended that in order to obtain the court's consent, the matter would have to be placed on a court's calendar. (Respondents' Brief, fn. 42, p. 59). There is nothing in the record or in common sense to hint that such a procedure need be followed. The consents of the attorneys could be quickly obtained, and the court's order surely could issue ex parte. These tasks ought to be able to be accomplished within a few hours.

In the same footnote KQED criticizes the idea that the media might gain information by interviewing released prisoners. When it is remembered that 28,000 inmates pass through Santa Rita

each year (R.T. 85), it is evident that there is a high turnover among the prisoners, and that many are released from the daily release buses. (R.T. 98) In Mr. Justice Powell's dissenting opinion, it was suggested that interviewing recently-released prisoners was a good alternative means of gaining information. *Saxbe v. Washington Post,* 417 U.S. at 848.

E. Tours.

KQED asserts that one of the defects of a scheduled tour is that the facility can be "scrubbed up" for the occasion, and that this had happened under a previous sheriff. (Respondents' Brief pp. 7, 10) Circuit Judge Hufstedler thought the point of some importance. (Petition for Writ, Appendix pp. 25-26) There was no testimony in support of these allegations; moreover, with semi-monthly tours having been scheduled for almost two years now, such scrubbings, if they occurred, would have become routine maintenance, and reflective of the actual conditions in the facility.

Respondents criticize photographs of the jail furnished by the Sheriff as not encompassing the entire facility. (Respondents' Brief, p. 8, fn. 8) The evidence indicates that the Sheriff is willing to provide more photographs if asked. (Appendix to Petitioner's Opening Brief, pp. 2-3, and R.T. 110-111)

The omission from the tour of the barracks building housing pretrial detainees, "Little Greystone", is also angrily pointed out by Respondents. (Respondents' Opening Brief, p. 8) But the inmates in the other barracks around Little Greystone are convicted persons, and cannot legally be mixed with the pretrial detainees. (R.T. 108) Hence Little Greystone is not seen on the tour, because there is no place to move those inmates while the tour is in progress. (R.T. 77)

It is true that the testimony of the reporter was that "The most effective thing we can do on television is not filter [the

information] through a reporter, but show it directly". (R.T. 180, Respondents' Brief, p. 9) However, this should be regarded in context with another statement by the same witness: "The next most effective means of informing the public would be for a news reporter to inspect the cells and facilities and report thereon." (A.12) Precisely that access was granted that witness. (A.60-61)

ARGUMENT

I

Respondents' Reliance on the Cases of Pell v. Procunier and Saxbe v. Washington Post Co. for the Principle That Press Rights of Access Are More Extensive Than Those of the General Public Is Misplaced.

Respondents' brief consistently refers to *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) as validating press rights of access to prisons and their inmates, which rights were more extensive than those possessed by the general public and broader than those accorded the press by the Petitioner in the instant case. For example, at page 29 of their brief, Respondents argue that "[t]he Court's 'no special access to information statement' [in Pell] must be read in the context of prisons that already permitted very substantial press access."

Petitioner asserts that such a construction of *Pell* and *Saxbe* is both inaccurate and misleading. A thorough reading of both cases in the light of several well-known canons of judicial construction confirms that both decisions resulted from the application of a general rule of long standing: namely, that press rights of access should be no greater than those of the general public.

It has long been the rule that where material legal or factual issues have not been contested in a prior case before this Court, the Court shall not consider itself bound by the views expressed therein with respect to those issues. *Cross v. Burke,* 146 U.S. 82, 87 (1892); *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 379 (1949). Stated another way, former dictum should not control judgment in an action in which the point is directly presented.

Williams v. United States, 289 U.S. 553, 569 (1933), *Pacific Co. v. Peterson*, 278 U.S. 130, 136 (1928). Deference to these judicial policies requires that reasoning which furnishes the entire basis for the conclusion reached in a case is to be preferred, in subsequent cases, to reasoning that provided only a partial basis. *Eisner v. Macomber*, 252 U.S. 189, 205 (1920).

Thus the controlling holding in *Pell v. Procunier* is that holding which most directly disposed of the contested legal issues. Those issues set forth at page 833 were: (1) "that [the state regulation under scrutiny] constitute[d] governmental interference with . . . news gathering activities that [was] neither consequential nor uncertain"; (2) ". . . that no substantial governmental interest [could] be shown to justify denial of [requested] press access . . ."; (3) that despite the access already accorded the press, the requested access was such an effective and superior method of newsgathering that its curtailment amounted to unconstitutional state interference with a free press.

All three of these contentions were rejected by the Court, which in support of its determination applied a principle of law previously applied in cases in which press access to government facilities was asserted to be inadequate. That principle was that the press has no greater rights of access to government facilities than that accorded the general public.[4]

4. Indeed in *Saxbe v. Washington Post Co.* the court (by Mr. Justice Stewart) states: "We find this case constitutionally indistinguishable from *Pell v. Procunier* [citation] *and thus fully controlled by the holding* in that case: '[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public'. [Citation] The proposition 'that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court.'" *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (emphasis is supplied.)

The primary holding of *Pell v. Procunier* and *Saxbe v. Washington Post Co.* is reiterated in a number of recent cases of the United States Court of Appeals. In *Garrett v. Estelle*, the Court of Appeals for the Fifth Circuit quotes *Pell v. Procunier* as follows: "The First and Fourteenth amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by the public generally." ..... F.2d ....., ... (5th Cir. 1977). Accord, *Cent. S. Car. Ch., Soc. of Prof. Journ. v. U.S.D.C.*, 551 F.2d 559, 563 (4th Cir. 1977).

"The [Supreme] Court made no *ad hoc* determination in *Saxbe* and *Pell*; it proceeded from the general principle, quoted above, that the press has no greater right of access to information than does the public at large; and that the first amendment does not require government to make available to the press information not available to the public. This principle marks a limit to the first amendment protection of the press' right to gather news. . . . the first amendment does not invalidate non-discriminatory prison access regulation." *Garrett v. Estelle*, ... F.2d ..... (5th Cir. 1977)

The validity of press access *allowed* by state prison officials at the case's inception was never contested by either side. And though existing access was adverted to by the Court, the validity of that access was never directly ruled upon.

In light of the cases cited above it is submitted that absent a direct ruling, the validity of existing press access in *Pell* should not be construed as the controlling factor in the Court's decision to limit further press access. To elevate the Court's failure to rule upon an issue never raised (i.e. was the extent of access already accorded, constitutionally compelled) and therefore never submitted to the scrutiny generated by advocacy, would be to allow precedent to evolve from those facts and law which were not considered, rather than those which were. Petitioner contends that to do so would be improper and unwise.

II

Pell and Saxbe Lend No Support to Respondents' Contentions That Press Rights Should be Different or More Extensive Than Those Possessed by the General Public.

In their brief Respondents repeatedly emphasized the needs of the press for more extensive and more specialized sorts of access

to Santa Rita than those afforded the general public. Though there is nothing in the record in support, Respondents' argument is premised on its assumption that "[a]side from the practical differences justifying different kinds of access, press and public have different purposes for going to the jail. Members of the general public may wish to see the jail for some personal reason, or out of idle curiosity. But reporters go for reasons unique to the function which the press performs on behalf of the public . . . To fulfill this purpose, they need access at least approximating that permitted in *Pell-Saxbe*." Resp. Brief p. 40.

Petitioner has found no case decided by this Court, and Respondents have cited none, which expressly accords special status for purposes of access to the press. Rather, "[h]istorically the rights of speech and the press have been co-extensive, merged into the common phrase 'freedom of expression.' [citations] Under such reasoning, an argument that the press is entitled to a special right of access to information based on freedom of the press alone would fail because rights based on freedom of the press would not be any more expansive than those based on freedom of speech; where there are valid reasons for limiting public access to information, the right of access by the press would be similarly restricted." Comment, Bans on Interviews of Prisoners: Prisoner and Press Rights after *Pell* and *Saxbe*, 9 USF L.Rev. 718, 730 (1975)

> In *Time, Inc. v. Hill* [385 U.S. 374 (1967) a case relied upon by Respondents at RB pg. 24] the Court also used free expression language while holding that constitutional protection extended to factual reports of matters of public interest. Although the Court observed that '[t]he guarantees for speech and press are not the preserve of political expression or comment on public affairs' it nevertheless went on to remark:
>
> 'Erroneous statement is no less inevitable in such a case [of one other than a public official] than in the case of comment upon public affairs, and in both, if innocent or merely negligent "'. . . it must be protected if the *free-*

> *doms of expression* are to have the 'breathing space' that they 'need . . . to survive'" . . . *New York Times Co. v. Sullivan* (citation)'" (emphasis in original) Comment: The Right of the Press to Gather Information, 71 Colum.L.Rev. 838, 842 (1971).

In light of the historical reluctance to see freedom of the press as much more than a particularized form of freedom of speech, it is submitted that to differentiate between press and public in the evaluation of the adequacy of access rights to government institutions, such as jails, is likely to result in both decreased and inappropriate rights of public access. For although Respondents seek to treat press and public as two homogeneous groups, it is painfully clear that they are not. And although Respondents seek to accord to each group predictable motives and objectives, i.e. idle curiosity to the public, and a particular sort of zeal and integrity to the press, there is nothing in the record that so denigrates the public's reasons for seeking information or so blithely rationalizes those of the press. With certain fairly obvious exceptions there are no guidelines for evaluating who is the press and who is not.[5]

It must be asked therefore if the general news reporter for a newspaper or a television station is to be accorded greater access

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5. ". . . [I]f the press clause were to mandate special newsgathering rights, specifying its beneficiaries would be difficult since the activities of 'press' newsgatherers would seem to be indistinguishable from those of 'public' information seekers.

A distinction between 'press' and 'public' gatherers based on their past or future use of a mechanism for disseminating information could be easily circumvented. And any definition of the press in terms of circulation, regularity or stature of the publication would as a general rule seem constitutionally unjustifiable since such a definition might create barriers to the flow of information from diverse points of view. Inevitably, the opinion and perspective of the newsgatherer governs his selection of what to acquire. Similarly, since the press generally has the discretion to publish only what it desires in a form which it chooses, information that does not suit the political, commercial or personal interests of the reporter or editor, or that does not meet a threshold of relatively widespread interest may not reach the public."

Note, *The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505, 1508-09 (1974).

to jail inmates than the trained penologist or sociologist; whether a press photographer or cameraman should be allowed use of his tools while a freelance commercial or fine artist should be denied the use of his; whether the employee of megalopolitan daily paper should be afforded the right to interview, while the editor of a weekly suburban 'penny saver' should not.[6]

The question of whether media members should be accorded special access rights is considered in *Pell* and *Saxbe*. It is summarized in Mr. Justice Powell's dissent in *Saxbe* (at page 856) as follows; ". . . [T]he gist of the argument is that the constitutional guarantee of a free press may be rendered ineffective by excess restraints on [press] access to information . . ."

The Court based its rejection of the argument on a number of grounds: (1) As summarized by Mr. Justice Powell in his dissent at page 857, . . . "[N]either news organizations nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create particular special privileges for particular groups or individuals." (2) Most soundly rejected by *Pell* and *Saxbe* were assertions that the nature of press investigations necessarily requires direct press access. Reference is made, for example, at page 834, fn. 9 in *Pell* to Mr. Chief Justice Warren's statement in *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) as follows: "There are few restrictions on action which could not be clothed by ingenious arguments in the garb of decreased data flow." (3) The Court also observes

6. "[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). And, in addition to newspapers, magazines, television and radio the Court has held the following to constitute constitutionally protected forms of speech: pamphlets, *Lovell v. City of Griffin*, 303 US 444, 452 (1938), leaflets, *Schneider v. New Jersey*, 308 U.S. 147 (1939), signs, *Thornhill v. Alabama*, 310 U.S. 88 (1940), books, *Roth v. United States*, 354 U.S. 476, 488 (1957) (dictum), motion pictures, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), and non-commercial advertisements, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

at page 823-24 that though sustained face-to-face debate, discussion and questioning may possess particular qualities, in the consideration of rights of access it cannot be considered without resort to appraisal of alternative means of information gathering. (4) At pages 827-28 fn. 5 of *Pell* the argument that illiteracy of many inmates justifies increased press access to them is also soundly rejected.

In short, equation of press and public rights of access is amply supported by *Pell* and *Saxbe*, the two most recent decisions of this Court directly in point. *Pell* and *Saxbe* are in turn consistent with cases that precede them and hold that press and public free speech rights are co-extensive as particularized forms of freedom of expression. The co-extensive nature of such rights and the dearth of authority distinguishing between press and public rights of speech or access require equality in the fashion in which access to information is extended by the government.

Respondent has failed to establish grounds for modifying those decisions.

CONCLUSIONS

The holdings of *Pell* and *Saxbe* are that the press has no greater right of access to information than that of the general public. Respondents' assertion that the two cases validated more extensive rights of access to the press is incorrect.

Pell and *Saxbe*, as well as other cases of this Court, defeat Respondents' assertions that press rights of access should be different or more extensive than those of the general public.

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No. 76-1310

THOMAS L. HOUCHINS,
Petitioner,

v.

KQED, INC., *et al.*,
Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL NEWSPAPER ASSOCIATION, THE ARIZONA NEWSPAPERS ASSOCIATION, THE PENNSYLVANIA NEWSPAPER PUBLISHERS ASSOCIATION, THE SOUTH DAKOTA PRESS ASSOCIATION

As *Amici Curiae* in Support of Respondents

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The National Newspaper Association – joined by the Arizona Newspapers Association, the Pennsylvania Newspaper Publishers Association and the South Dakota Press Association – respectfully submit this brief as *amici curiae* in support of Respondents KQED, Inc., *et al.*, and urge affirmance of the decision of the United States Court of Appeals for the Ninth Circuit, *KQED, Inc., et al. v. Houchins,* 546 F.2d 284, 2 Med.L.Rptr. 1115 (9th Cir. 1976).

Submitted with this brief, pursuant to Rule 42(2) of this Court, are the written consents of the parties for the filing of this brief.

INTEREST OF THE AMICI CURIAE

The National Newspaper Association (NNA) is a 93-year-old national association of more than 6,000 newspapers (950 dailies and 5,300 weeklies). NNA members include newspapers of general circulation in the Alameda County area. The named state press associations represent members who publish newspapers in their respective states.

NNA represents its members in national matters affecting business and professional aspects of newspaper publishing. The members range from small weekly newspapers to large metropolitan dailies, covering a wide philosophical and political spectrum. The great bulk of the membership consists of rural and suburban weeklies and small city dailies.

Member newspapers believe that they have a constitutional obligation to report on the functioning of local government and the stewardship of local public officials – especially as that stewardship concerns the condition and operation of publicly-financed institutions engaged in the involuntary incarceration of individuals. It is the view of these members that unreasonable restrictions on the ability to gather news about these institutions are abhorrent to the proper conduct of democratic government.

STATEMENT OF THE CASE

Amici curiae adopt Respondent's statement of the case. The chief facts are as follows: In March 1975, non-commercial television station KQED reported the suicide of a prisoner in Petitioner Sheriff's Alameda County Jail at Santa Rita, based on reports which the station was unable to verify fully. KQED also telecast statements by a jail psychiatrist that conditions at the facility were partly responsible for prisoners' emotional problems. A KQED reporter then

asked Petitioner for permission to see and photograph the jail. Jail officials denied the request and Petitioner cited his unwritten "policy" that the news media could not enter the jail. Another reporter was also unable to gain entry to cover stories of alleged gang rapes and poor conditions.

KQED brought suit in the United States District Court for the Northern District of California seeking injunctive relief to prevent the Petitioner from barring KQED reporters from the jail facility. The Court received affidavits and conducted an evidentiary hearing. The evidence showed that subsequent to the filing of the suit the Petitioner had inaugurated a series of public tours. Representatives of the press could attend a tour, but the evidence showed that each tour had a limit of 25 persons; that spaces were available on a first come, first served basis; that within one week of the announcement of the tours there were no spaces remaining for the six in 1975; that the tours did not include the Little Greystone barracks used to house pre-trial detainees; that the tours did not include the "disciplinary cells" in the Greystone facility;[1] that participants in the tours could not speak with any inmates encountered during the tours; that the participants could not take photographs; that the photographs offered for sale by the Petitioner did not fairly depict inmate life; that there was a ban on tape recorders; that the inmates were not generally visible to participants; that the tours were on a "schedule only" basis and never conducted at any time on request; and that in reality the participants never saw normal conditions at the jail.

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[1] Three years before the facts in this case arose, a United States District Court found conditions of confinement at Petitioner's Greystone facility to be "cruel and unusual." *Brenneman v. Madiagn*, 343 F.Supp. 128, 132-33 (N.D. Cal. 1972).

Petitioner presented "testimony illustrating in detail the route of the tour, and the interiors and exteriors of the buildings visited, including descriptions and photographs of the foregoing. Plans of the facility were admitted in evidence to illustrate the course of the tour . . ." Petitioner's Opening Brief at 8. The District Court concluded that the Petitioner's policy was inadequate.

The Ninth Circuit upheld the granting of a preliminary injunction requiring Petitioner to grant reasonable press access to the jail. The injunction was conditioned on the Sheriff's authority to restrict media access during circumstances at the jail which would make such access dangerous.

I. THE FIRST AND FOURTEENTH AMENDMENTS PROTECT THE RIGHT OF THE NEWS MEDIA, AS REPRESENTATIVES OF THE PUBLIC, TO OBSERVE FIRSTHAND AND REPORT ON THE CONDITIONS AT PRISONS AND OTHER PUBLIC INSTITUTIONS, ESPECIALLY THOSE WHERE THERE IS INVOLUNTARY INCARCERATION OF INDIVIDUALS.

Amici contend that the fundamental issue presented by this case is the right of the news media – and in turn the public – to see the conditions existing in institutions maintained by public authority. *Amici* submit that the contested "policy" of Petitioner Sheriff Houchins deprives the news media and the public of valuable information in violation of the First and Fourteenth Amendments to the Constitution of the United States.

The daily conduct of American government at the local, state and federal levels takes place largely within institutional environments. Inside the walls of these facilities government bears the responsibility for prisoners, medical patients, juveniles, the elderly and the infirm, and the poor. Yet, it is

the public which ultimately bears the responsibility for the condition and operation of these publicly-financed institutions.

Since private individuals cannot generally exercise this responsibility on their own, they necessarily depend on the news media for information:

> [I]n a society in which each individual has but limited resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

The news media must be able to enter and view public institutions if they are to fulfill their obligation to bring "an independent scrutiny to bear on the forces of power in society, including the conduct of official power at all levels of government." A Statement of Principles, American Society of Newspaper Editors, *The Bulletin*, Nov./Dec. 1975 at 23. News concerning public institutions is an essential part of our "profound national commitment" that the public requires a free flow of information on the conduct of government by public officials. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). After all, public officials administer these institutions and it is these officials who are ultimately responsible to the citizenry. Close scrutiny of public facilities therefore, is nothing more than evaluation of the stewardship of officials charged with vital public duties.

This Court has recognized that the First Amendment embodies protection for activities associated with newsgathering, that "news gathering is not without its First Amendment protections . . . ." *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). For, "without some protection for seeking out

the news, freedom of the press could be eviscerated." *Id.* at 681. Ultimately, the failure to protect the right to gather news in public institutions could lead to the failure of the people to be able to make informed judgments about the conduct of their government.

Nowhere is it more important to provide the public with information about its institutions than in those situations involving involuntary incarceration. "[F]rom the standpoint of society's right to know what is happening within a penal institution, it is perfectly clear that traditional First Amendment interests are at stake." *Morales v. Schmidt*, 489 F.2d 1335, 1346 (7th Cir.) (Stevens, Circuit Judge, dissenting), *mod. en banc*, 494 F.2d 85 (1974). For only by obtaining information on these conditions may the public act to correct abuse or institute change.

> The conditions in public institutions such as Bridgewater for the care of the criminally insane, including the physical facilities . . . are matters which are of great interest to the public generally. Such public interest is both legitimate and healthy. Quite aside from the fact that substantial sums of taxpayers' money are spent annually on such institutions, there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests. *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727, 728-29 (S.D. N.Y. 1967).

The secrecy which Petitioner apparently wishes to impose on the Santa Rita jail offends basic notions of the role of a free press in an open society. It is precisely in those situations where officials seek to deny access that the possibility of abusive conditions is the greatest.[2]

> It is important that conditions in public institutions should not be cloaked in secrecy, lest citizens may disclaim responsibility for the treatment that their representative government affords those in its care. *Wiseman et al., v. Massachusetts et al., pet. for cert. denied*, 398 U.S. 960, 962 (1970) (Harlan, J., dissenting).

II. PETITIONER'S UNWRITTEN POLICY AND MECHANISM FOR NEWS MEDIA ACCESS TO THE SANTA RITA JAIL VIOLATE THE MEDIA'S RIGHT TO GATHER AND DISSEMINATE NEWS AND THE PUBLIC'S RIGHT TO RECEIVE INFORMATION ABOUT THE CONDITIONS OF PUBLIC INSTITUTIONS.

Petitioner's unwritten "policy"[3] prohibits news media entry to the Santa Rita jail other than as a participant in a pre-scheduled tour – a tour the District Court found inadequate for newsgathering. The result of Petitioner's policy is that he is able to control completely what the public knows about his stewardship of the facility.

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[2] *Cf.* Amnesty International, *Report on Torture, World Survey of Torture* 109 (Duckworth & Co., London 1973).

[3] *Amici* allege that a serious question exists as to whether Petitioner may constitutionally restrict First Amendment rights without reducing his "policy" to writing. *See United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976) (Conviction for overnight sleeping in federal park, as part of protest, violates First Amendment where officials possess discretion to allow such sleeping but no written standards guide that discretion); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (Restrictions on freedom of expression of high school students by administrators may only be accomplished through precise written guidelines).

Petitioner attaches great significance to the availability of alternative sources of information instead of news media entry into the jail. This reliance is wrong for none of the alternatives allows news personnel to verify through first-hand accounts reports they might receive from an inmate's letter, for example. Indeed, this case began because of unverified reports of poor conditions in a portion of the facility still out-of-bounds to this date to public and press. Moreover, this Court itself has emphasized the importance of verification in news reporting. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *see also, Phillips v. Evening Star Newspaper Co.*, 2 Med.L.Reptr. 2201, 105 Daily Wash. L.Reptr. 1425 (District of Columbia Superior Court 1977) (Newspaper liable for publication of false information received directly from police "hot line"). Simply stated in the context of this case, a reporter cannot be certain about the true facts existing in a prison by sitting on the doorstep. A reporter would be irresponsible if a story were approached in that way and it would be no less irresponsible for a reporter to rely totally on the Sheriff for a report on conditions or facilities at the jail.[4]

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[4] The following story vividly highlights the shortcomings of total reliance on prison personnel in reporting on penal institutions:

> In suburban Denver, the Sentinel weeklies ran a story written by Dick Sides about brutal jail treatment.
>
> "Prisoners were beaten, mutilated and raped in the Adams County Jail last spring and early summer," the feature began.
>
> Other inmates did the punishing, at least twice setting up kangaroo courts, declaring fellow inmates guilty of the crimes for which they were jailed, then savagely punishing them as sentences, Sides wrote.
>
> He based his article on a study conducted by probation officers and an interview with an undersheriff.
>
> (continued)

Amici view the access accorded the media by the public tours to be a patently unreasonable limitation on the media's right to gather news and the public's right to information about the jail. In the words of Judge Hufstedler:

> The media mission however, is different in degree, though not in kind, from the display to a tour group. The newsmen's function is to gather, to collate, and to transmit to a wide public audience all of the information which the public is entitled to know about prison conditions. A private tour group might have similar or better ability to gather information than newsmen, but it would be rare that the combination of training and the means of transmission enjoyed by the news media would be found in a tour group. An adequate view of prison conditions is unlikely if the observer is confined to the areas of prisons and the times of visitation that are appropriate for conducted tours. *KQED, Inc. v. Houchins*, 546 F.2d at 296 (Hufstedler, Circuit Judge, concurring).

Without the ability to employ photographic equipment, barred from important sections of the facility, and dependent upon the Sheriff to schedule a tour, it is obvious that the Sheriff's policy totally frustrates the media's access to the jail for the purpose of gathering and disseminating news.

It is for this reason that petitioner may not place reliance on *Pell v. Procunier*, 417 U.S. 817 (1974), or its companion

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[4] (Continued)

> The guards never discovered any of the reported incidents because prisoners acted as lookouts and "the code of the jail is 'Keep your mouth shut,'" said the county undersheriff.
>
> *Publishers' Auxiliary*, November 25, 1976, at 12.

case *Saxbe v. The Washington Post Co.*, 417 U.S. 843 (1974). Both *Pell* (California state prison system) and *Saxbe* (Federal Bureau of Prisons) approved flat bans on face-to-face interviews by the news media of inmates selected by the media. In ruling on claims of constitutional injury raised by the news media, the Court used language which suggested measurement of the media's right of access co-extensively with the public's. 417 U.S. at 834-35. However, in both *Pell* and *Saxbe*, "[e]xcept for the limitation . . . on face-to-face press-inmate interviews, members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there." *Saxbe* at 847. In *Saxbe*, members of the media could tour the federal prisons, photograph any prison facilities, interview inmates encountered on such inspections, and even interview randomly selected groups of inmates. *Id.* at 847-48. In *Pell*, California state prison regulations allowed reporters to visit maximum security sections of the institutions, to stop and speak with inmates, and to have access to "all parts of the institutions. . . ." *Pell* at 830.

It was these facts which compelled this Court to observe: "We note at the outset that this regulation [prohibiting face-to-face interviews upon request] is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions." *Pell* at 830. Similarly, in *Saxbe*, the Court found no "attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons." *Saxbe* at 848. In the present case, a markedly different situation is apparent because Petitioner claims total authority to bar media access on any basis whatsoever. In fact, the result has been a near total restriction on the flow of news from the place where inmates are incarcerated. Thus, unlike the situation in *Pell* and *Saxbe*, the Court in this case is asked

by administrators to authorize a news blackout. Access to the prison as a place must therefore be measured by a different standard, and a different factual showing must be made, than access to individual inmates for the purpose of obtaining an interview.

The inevitable conclusion here is that Petitioner has frustrated media access to a public institution to such an extent as to cause serious First Amendment injury to the media and the public for whom they report.

III. LOCAL OFFICIALS MAY EMPLOY REASONABLE TIME, PLACE AND MANNER RESTRICTIONS BUT MAY NOT USE THESE RESTRICTIONS TO PREVENT NEWS MEDIA OBSERVATION AND REPORTING ON CIRCUMSTANCES AND CONDITIONS IN PUBLIC INSTITUTIONS ABOUT WHICH THE PUBLIC IS ENTITLED TO BE INFORMED.

Without doubt, a county ordinance prohibiting news media publication of any and all information concerning conditions at the Santa Rita jail would be unconstitutional. Just as surely, local regulations which operate to preclude effectively that reporting may not stand.

The fundamental flaw in Petitioner's unwritten policy is that it puts the burden on the news media to demonstrate reasons for admittance when as a matter of law the burden to justify exclusion must rest with the government. "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." *Estes v. Texas*, 381 U.S. 532, 615 (1965) (Stewart, J., dissenting).

The Petitioner has substantial discretion to impose conditions upon the entry of news media representatives to the

jail facility. But this authority to control the time, place and manner of access may never, as it has in the instant case frustrate meaningful access to news. *Amici* endorse the overall standard articulated by Judge Hufstedler in the decision below:

> [T]he public's right to knowledge about the conditions of prisons and prisoners is very extensive. Information should not be curtailed except to the extent reasonably necessary to shield the prisoners' small store of personal privacy, to protect the physical security of the prison, the prisoners, and the prison personnel, and to allow prison personnel enough privacy and administrative control to permit them effectively to perform their duties. As the eyes and ears of the public, newsmen are entitled to see and to hear everything within the institution about which the general public is entitled to be informed. 546 F.2d at 295-96.

Only upon a showing of actual danger to the security of the institution, or the safety of the inmates, may the Sheriff deny access to the press. Absent such a showing, the media must have access to the jail.

In order for the community press to fulfill its role as watchdog of local government, reporters and photographers must be able to enter prisons and other publicly-financed institutions, restricted only by rules honoring significant competing state interests and subject to reasonable time, place and manner regulations. A "no press access" or unreasonably "limited press access" policy is effectively a "no public access" rule. It is a rule which is unacceptable in our democratic system.

CONCLUSION

The freedom of the press to enter, and report on the operation of, publicly-financed institutions – and especially places where there is involuntary incarceration – is fundamental to our Constitutional scheme of government. The First Amendment recognizes that the press has a special role to perform as the public's representative in reviewing the operation of government institutions. Indeed, in this case, enhanced press access to the Santa Rita jail would provide the *governed* of Alameda County with the only reasonable means of exercising their democratic responsibility to know how their elected *government* carries out its duties. *Amici* urge this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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BRIEF FOR KEARNS-TRIBUNE CORPORATION AS AMICUS CURIAE

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 546 F.2d 284 (1976). The Findings of Fact and Conclusions of Law of the District Court are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was dated

and filed November 1, 1976. A Petition for Rehearing was thereafter filed and denied. The Petition for a Writ of Certiorari was filed March 22, 1977, and the Petition for a Writ of Certiorari was granted May 23, 1977.

This Court has jurisdiction to review the judgment in question of the Court of Appeals pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution reads in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech or of the press; . . . .

QUESTION DISCUSSED BY AMICUS CURIAE

Kearns-Tribune shall restrict its argument to the question of whether limiting press access to prisons to the same standard of access accorded the public at large when there is no compelling state interest for restrictions on press access allows the state a power of prior restraint and censorship.

INTEREST OF KEARNS-TRIBUNE CORPORATION

Kearns-Tribune Corporation is the owner and publisher of *The Salt Lake Tribune*, a newspaper published seven days a week. *The Salt Lake Tribune* is one of two major newspapers published in Salt Lake City, Utah. It is distributed throughout the State of Utah and portions

of surrounding states. Kearns-Tribune Corporation has an interest in this case because of its general interest in the protection of the rights accorded the press under the First Amendment and because of its interest in providing proper news coverage to conditions that exist in local prisons and newsworthy events which occur there. Kearns-Tribune Corporation also has an interest in this case because of its potential effect on litigation in which it is engaged concerning the right of access to death row prisoners and the right to have a reporter present at an execution.

The decision of this Court in the case at bar is likely to have a siginificant effect on these cases. Kearns-Tribune Corporation has pending in the United States District Court for the District of Utah an action challenging the right of the State of Utah to exclude entirely newspaper reporters from interviewing inmates who have been condemned to death and are housed on death row at the Utah State Prison. This litigation is styled "*Kearns-Tribune Corporation a/k/a The Salt Lake Tribune vs. Utah Board of Corrections, et al.*, Civil No. C-76-372. A temporary restraining order was vacated by the Court of Appeals for the Tenth Circuit *sub nom.*, *Utah Board of Corrections, et al. v. Honorable Chief Judge Willis W. Ritter*, 76-2087 (dated December 7, 1976).[1]

Kearns-Tribune Corporation also has pending in the Court of Appeals for the Tenth Circuit an appeal from a decision of the United States District Court for the

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[1] An application for a stay of the Court of Appeals' order was denied by this Court on a 7-2 vote, *Kearns-Tribune Corp. v. Utah Board of Corrections, et al.*, Case No. A-488, December 17, 1976.

District of Utah which sustained the constitutionality of a Utah statute, Section 77-36-18, *Utah Code Annotated* (1977 Supp.) which excludes newsmen from witnessing the execution of a convict condemned to death. That case, *Kearns-Tribune Corporation, a/k/a The Salt Lake Tribune, et al. vs. Utah Board of Pardons, et al.*, No. 77-1213, has been briefed but not argued.

However, the interest of Kearns-Tribune Corporation in this amicus brief is not to deal in any way with the facts of the above two cases to which it is a party. Rather, it is our purpose to address the main issues in the instant case: whether press access to prisons is in all cases limited by the extent of the general access accorded the public and whether press access may be limited without compelling reasons.

STATEMENT

In view of the parties' full presentation of the facts in this case, we shall not undertake to deal with them except to comment briefly upon the decision of the court below which sustained the position of KQED, Inc.

The court below sustained the issuance of the trial court's preliminary injunction which prohibited the Sheriff of Alameda County, California, from denying media representatives full and accurate coverage of jail conditions "at reasonable times and hours . . ." (546 F.2d at 285). The three judges of the panel of the Ninth Circuit which heard the case were apparently uncertain as to the degree to which this Court's decisions in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Sarbe v. Washington Post Co.*, 417 U.S. 843 (1974), should be extended beyond the particular facts in those cases. Each wrote a separate opinion, but each concurred in affirming the order of the lower court, although on different grounds.

District Judge Pregerson, sitting by designation, was of the opinion that the trial court's Memorandum in support of the preliminary injunction rested upon a finding that the First Amendment rights of both the public and the news media were infringed by the restrictive policies of the Sheriff of Alameda County (546 F.2d at 286). This view of the law would have the effect of enlarging the public's rights of access to prison facilities as well as that of media representatives.

Circuit Judge Duniway stated a belief that the preliminary injunction could not be squared with this Court's decisions in *Pell* and *Sarbe*, but stated (546 F.2d at 294):

> I happen to believe that, as to most issues of public importance, and assuming that one accepts the media-created notion that there is such an animal as a constitutionally protected 'public's right to know' and further assuming that the media somehow embody that 'right,' then the media have a protected preferred right to access to information about the public's business. This is based on the proposition that, in our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about about the public's business. Witness 'Watergate' and its remarkable consequences.

Pursuant to this view, Judge Duniway then observed (546 F.2d at 295):

> It seems to me to be obvious that regulations governing media access to a jail, assuming that the media have a right, along with the public, to such access, must differ from regulations governing access by the public at large. It is one thing to say that representatives of the media, who are not numerous and who can readily be screened, should be able to interview inmates, take pictures, etc., and quite another thing to say that any one of the several million inhabitants of the San Francisco Bay Area or any one of the million or so inhabitants of Alameda County, should have the same rights. The administrative problems posed by the two are obviously different, and the law ought to recognize the differences. But as I read *Pell, supra*, and *Washington Post, supra*, those cases far from recognizing these differences, expressly disregard them.

Circuit Judge Hufstedler approached the problem from a somewhat different angle. She stated (546 F.2d at 295):

> Two separate, but related questions are involved: (1) What kind of information about prisons and prisoners does the public have a right to know? or to put the question differently, from what kind of information about prisons and prisoners should the public be excluded? (2) What kinds of limitations can be imposed on the public and on the news media upon the means by which the information to which the public is entitled can be gathered?

Because of the different administrative problems which arise out of the difference in making prison facilities accessible to the press compared with making them accessible to the public as a whole, and based on the premise that the media are entitled to information concerning the prisons, Judge Hufstedler found that the district court's injunction was consistent with the teaching of *Pell* and *Saxbe*.

ARGUMENT

This Court has on several occasions recognized that news gathering is entitled to protection under the First Amendment. News gathering necessarily entails conduct, which, except to the extent it serves as a necessary vehicle for news gathering, would not be entitled to First Amendment protection. Nevertheless, there has been increased recognition that a viable and vigorous press must be accorded some constitutional protection in its news gathering activities, and this Court has referred with increasing frequency to the proposition that such activities are covered by the First Amendment.

Zemel v. Rusk, 381 U.S. 1 (1965) was the first case in which this Court commented on the topic. The Court stated (*Id.* at 17): "The right to speak and publish does not carry with it the *unrestrained* right to gather information" (emphasis added). By the careful use of the term "unrestrained," the inference was clear that the gathering

of information is entitled to at least some constitutional protection.

This principle was stated more clearly and explicitly in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). The Court stated:

> Nor is it suggested that news gathering does not qualify for First Amendment protection; *without some protection for seeking out the news, fredom of the press could be eviscerated* (emphasis added).

Recognition of this principle was also repeated in *Pell v. Procunier*, 417 U.S. 817, 833 (1974).

The importance of extending constitutional protection to news gathering activities need hardly be labored. It need only be stated that if the public and the press are both denied access by governmental restrictions to information and news sources concerning vital public issues, the restraint on the press is far more extensive and complete than any prior restraint. Publication of prohibited material might occur despite legal sanctions; it is self-evident that information will not reach the public when there is a total news blackout under the guise that the government is merely regulating conduct. As Mr. Justice Black stated in *New York Times Co. v. United States*, 403 U.S. 713, at 724:

> Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and

> wide-open' debate. For that reason, this Court has taken a strong stand against prior injunctions forbidding publication of certain matter.

In *New York Times Co. v. United States, supra*, the Court held injunctions against publication of material allegedly damaging to the national security interests unconstitutional. The Court reemphasized the repugnancy of prior restraints in stating, (403 U.S. at 714):

> 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity' *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70.

In *Near v. Minnesota*, 283 U.S. 712, at 714, the Court noted that prior restraints may be effectively imposed by both the executive and the legislative branches, in addition to the judiciary. The Court stated:

> Here, as Madison said, 'The great and essential rights of the people are secured against legislative as well as against executive ambition. These are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. The security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also.' 'Report on the Virginia Resolutions,' *Madison's Works*, Vol. 4, p. 543.

Recognizing that unofficial and indirect prior restraints may achieve an inhibition of publication similar to direct prior restraints, this Court has revised the law of libel by

abolishing the principle of strict liability because of the naturally self-censoring effect that it has upon the press in printing news necessary to the public decision-making process, *New York Times v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Associated Press v. Walker*, 338 U.S. 130 (1967); *Gertz v. Robert Welch*, 418 U.S. 323 (1974). In a similar vein, *Smith v. California*, 361 U.S. 147 (1959) held that a bookseller could not constitutionally be held strictly liable for selling obscene material because of the tendency to induce self-censorship of constitutionally protected material.

As noxious as a system of prior restraints is to First Amendment values, such a system is not as repugnant to the First Amendment as the complete suppression of news at the source, or a partial disclosure by press release, which is not subject to verification. Even if the government releases some information, the lack of verifiability makes possible the manipulation of the news and public attitudes. If prior restraints bear a heavy presumption against their constitutionality, the power to completely suppress access to news which has no facial justification for confidentiality ought also to receive close judicial scrutiny.

It is at least possible that the conditions which existed at Dachau and Auschwitz in Nazi Germany could not have existed had there been public knowledge concerning the activities carried on in those infamous places. Certainly information concerning the nature of the penal system in the United States, including prison conditions, types of disciplinary actions, and the humaneness of executions is information which is fit for public dissemination and cries out for greater public enlightenment and discussion. Clearly, government regulations which simply prohibit or severely restrict public and press access to information which may be of the highest public importance ought not to be justifiable on the same basis as regulations governing simple conduct, *i.e.*, a presumption of constitutionality.

In light of these authorities and the facts of the instant case, which show an official intent to manipulate the rules governing both public and press access to the Alameda County jail, we submit that it would be highly subversive of a free press attempting to expose conditions having high public importance to permit public officials to deny the press and public access to such conditions.

Given the facts of this case, which reveal an official manipulation of public access with a concommitant manipulation of press access amounting to prior restraints, we submit that this case cannot be decided, as the petitioner contends, on the basis of a wooden formula, i.e. that the press is entitled to no greater access than the public generally. The words of Justice Powell in *Saxbe v. Washington Post Co.*, 417 U.S. 843, at 860, are particularly pertinent here:

> At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that is both appropriate and necessary to require the Government to justify such regulations in terms more compel-

ling than discretionary authority and administrative convenience.

The petitioner in this case would have this Court dispose of this case on the basis that "KQED has no greater right of acces to information than the right possessed by the general public" (Petitioner's Br., p. 12). Petitioner relies primarily upon this Court's decisions in *Pell v. Procunier, supra,* and *Saxbe v. Washington Post Co., Inc., supra,* to support its conclusion. We respectfully submit that this Court's decisions in *Pell* and *Saxbe* do not compel the result contended for by petitioner.

The specific issue in both *Pell* and *Saxbe* was whether newsmen had a constitutional right under the First Amendment to single out specific inmates for the purpose of seeking to interview them. This limited contention arose in a factual context far different from the instant case. In neither *Pell* nor *Saxbe* was there any indication whatsoever of any intention to suppress any news concerning prison conditions or treatment of inmates. Indeed, the facts disclosed an openness and freedom of access which contrasts sharply with the facts recited in Respondents' Brief.

In *Pell,* the Court noted (417 U.S. at 830):

> We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions. [Footnote omitted]. The Department of Corrections regularly conducts public tours through the prisons for the benefit of interested citizens. In addition, newsmen are permitted to visit both the maximum and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants. In short, members of the press enjoy access to California prisons that is not available to other members of the public.

The Court also noted a similar degree of access in *Saxbe*, see 417 U.S. at 847-848.

In short, it is clear, as the Court specifically found, that the prison visitation policies in both cases were not designed to "conceal from the public the conditions prevailing" in the prisons (417 U.S. 830, 848).

The language in *Pell* and *Saxbe* which defines the scope of constitutionally protected access of the press in its news gathering activities in terms of general public access to sources and information, lends itself to the proposition that government may control press access by the simple expedient of controlling public access. The Court

has not made clear, however, whether governmental regulation of public access in all cases may be justified solely on the basis of a presumption of constitutionality or whether a more compelling justification must be made. If regulation of press and public access may, in the end, be justified on the ground that the regulation is reasonable, irrespective of the interest of the informational interests of the public, balanced against the government interest in withholding access, then government is accorded a power to control and tailor the amount and content of information in a manner which simply ignores First Amendment values. In the context of this case, the consequences would be to accord the Sheriff of Alameda County the power to refuse all access—both public and press—to the Alameda County jail even in the absence of a strong reason supporting such a restriction.

In the instant case there is no evidence of such openness to the public and to the press as existed in *Pell* and *Saxbe*. The limited restriction on press access in *Pell* and *Saxbe* to individual inmates, which prohibited singling out individual inmates for interviews, was justified in those cases on the basis of a factual showing that such interviews would "spawn serious discipline and morale problems" "by hostility and resentment" (417 U.S. at 849), and on the additional ground that particular press attention to individual inmates tended to be concentrated on a small number of inmates who as a result became "big wheels" with a disproportionate degree of notoriety and influence in the prison confines, (417 U.S. at 831, 848-849). In the instant case, however, the Petitioner does not argue that the relief granted by the trial court would re-

sult in any such disciplinary problems or a threat to the rehabilitation program. The Petitioner in its brief in this Court simply argues that the equal access rule ought to be mechanistically applied in this case.

Petitioner also contends that the District Court erred in failing to properly balance KQED's rights of access against the Sheriff's concerns. (Petitioner's Br. pp. 19-20). The Petitioner relies upon *United States v. O'Brien*, 391 U.S. 367 (1968) for the proposition that when speech and non-speech elements are combined in a course of conduct, an important governmental interest in regulating the non-speech elements can justify incidental limitations on First Amendment freedoms (Petitioner's Br. p. 20). The Court stated in *O'Brien* (391 U.S. at 376-77):

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inhears in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest. [footnotes omitted].

We agree that this type of analysis is appropriate in

access cases. We do not believe that this analysis justifies the restrictions on press access to the Alameda County jail imposed by the Sheriff. Neither of the lower courts found that the restriction of press access to guided tours as imposed by the Sheriff in this case is "no greater than is essential to the furtherance" of a legitimate governmental interest (ibid). Nor did they find a "compelling" or "paramount" penal purpose in the restrictions.

Of course in all access cases, there is an intermingling of conduct with protected First Amendment activity. After all, conduct is an indispensable vehicle for exercise of First Amendment rights. Thus, there is a necessity of balancing the governmental interests in regulating conduct with the First Amendment protected activity, as illustrated by *United States v. O'Brien, supra.* Any other approach would, we submit, make meaningless the statements by this Court that news gathering enjoys First Amendment protection.

In *Branzburg v. Hayes,* 408 U.S. 665, at 700-701, the Court engaged in just such a balancing of interests. The Court considered whether compelled disclosure of a reporter's sources was of sufficient important to law enforcement to outweigh the chilling effect on news gathering which results from forced disclosure. The Court struck the balance in favor of the state's interest in law enforcement.

Different results have been achieved, however, in civil cases with respect to disclosure of confidential sources on the ground that the governmental interests at stake do not

outbalance the interests of the press in news gathering activities. *Baker v. F & F Investment,* 470 F.2d 778 (2nd Cir. 1972); *see also United States v. Liddy,* 478 F.2d 586 (D.C. Cir. 1972). In *Baker* the Court stated that *Branzburg* had applied traditional First Amendment doctrine, "which teaches that constitutional rights secured by the First Amendment cannot be infringed absent a 'compelling' or 'paramount' state interest"... (470 F.2d at 784). The court in *Baker* held that there was no compelling reason in a civil case to justify the restraints placed upon news gathering activities by a compelled disclosure of confidential news sources.

This Court has recognized that prison conditions are of overriding public concern. In *Pell v. Procunier,* the Court noted that the general openness of the policy with respect to press and public access in that case reflected a "recognition that the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance. As the Chief Justice has commented, we cannot 'continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence . . . . It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem' " (417 U.S. at 830, n. 7).

The most effective remedy for enlisting greater public concern for problems arising in our penal system and for remedying injustices that exist there, is greater publicity. This Court, quoting from Jeremy Bentham in *In Re Oliver,* 333 U.S. 257, at 271 (1948) stated the importance of publicity with respect to the proper admin-

istration of the judiciary in language that is equally applicable in this case:

> 'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

The importance of public scrutiny of governmental operations finds particular application in the Sixth Amendment guarantee that criminal trials be public. Given the wide array of checks against arbitrary and improper conduct in judicial proceedings which the judiciary provides, the reliance of the founding fathers upon publicity as such an important check underlines the fact that in the operation of prisons, publicity is all the more important. We recognize, of course, that exigent conditions may on occassion require strict regulation of public and press access to prisons. However, in the normal course of events, in a practical and realistic sense, publicity can be given to prison problems and the public enlightened only if the press has access to such institutions. We believe that Judge Duniway, in the Court below, was quite right in stating that the media's preferred right to access to information about public business is based on the foundation that "in our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about the

public's business. Witness " 'Watergate' and its remarkable consequences" (546 F.2d at 294). This comment is particularly applicable to conditions existing in the nation's prisons.

In sum, news gathering is as indispensable to a free press as is the act of publication itself. In terms of overall First Amendment values, the right to gather news with respect to issues as to which the public should be informed is of overriding importance because it is primarily the newspapers and other media which focus the attention of the public on issues of critical importance. We do not believe that the necessary constitutional protection for news gathering can be accomplished by a mechanistically applied rule that the press has no special access beyond that accorded the public generally. In a very real sense, the press serves as the agent for the public, and that was apparently the intent of the founding fathers in giving constitutional protection to a primarily private activity and institution. We, of course, recognize that there are many areas in which the government has a legitimate interest in precluding access to sources and information. But this Court's decisions in the *Pell* and *Saxbe* cases stand for the proposition that the Nation's prisons cannot be placed under a cloak of partial or complete secrecy. On the contrary, the conditions in the prisons are of the utmost public importance, and press access to them must have some constitutional footing. From the facts in this case there has been no showing of a "compelling" state interest to justify the strict limitations placed upon press access, and those limitations were properly repudiated by the courts below.

CONCLUSION

For the foregoing reasons we submit that the judgment of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED,

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No. 76-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS L. HOUCHINS,

Petitioner,

v.

KQED, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND, AMERICAN SOCIETY OF NEWSPAPER EDITORS AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

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October 1977

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MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND, AMERICAN SOCIETY OF NEWSPAPER EDITORS AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Reporters Committee for Freedom of the Press Legal Defense and Research Fund, the American Society of Newspaper Editors and the Radio-Television News Directors Association ask leave to file the accompanying brief amici curiae. Respondents have consented to such filing. Petitioner has withheld his consent.

The very names of the movant organizations indicate the nature of their interest in this case, which raises an important question of access to news.

The Reporters Committee for Freedom of the Press Legal Defense and Research Fund is made up of working news reporters and editors actively engaged in the business of gathering news for newspapers, magazines, television and radio. The Committee attempts by participation in litigation to advance the principle, embodied in the First Amendment, that government shall not impair the people's right to know by abridging the freedom of the press.

The American Society of Newspaper Editors is a nationwide professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession."

The Radio-Television News Directors Association is a professional society of heads of broadcast news departments. It works for improving standards of broadcast journalism, and it defends the right of newsmen to access to news.

The movants believe that the restrictions imposed by the petitioner, Sheriff Houchins, on press access to the Alameda County jail facilities at Santa Rita pose a threat to the public's right to know about the workings of an important part of its government. They believe that they can illuminate the broad question of the constitutional validity of those restrictions as a result of the experience of their members in the gathering and publication and broadcast of news. They believe that such illumination will be useful to the Court, which should not be confined

in a case of this moment to the presentations of the immediate parties, able as these may be.

Respectfully submitted,

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QUESTION PRESENTED

The question presented is the constitutional validity of restrictions imposed by the petitioner, Sheriff Houchins, upon press access to the Alameda County jail facilities at Santa Rita. The result of the restrictions is to limit the facts available to the public about a public institution of the utmost social importance, an institution in which numerous individuals are held in confinement by public officials charged with responsibility for their custody and where substantial public funds are spent.

ARGUMENT

Three years ago this Court held that representatives of the news media were not constitutionally entitled to interview particular prison inmates of their designation. *Pell v. Procunier,* 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). In doing so, the Court nevertheless reaffirmed that "[n]ews gathering is not without its First Amendment protections." *Pell v. Procunier, supra* at 833, quoting *Branzburg v. Hayes,* 408 U.S. 665, 707 (1972). But it also said that "[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." 417 U.S. at 834, 850.

This case puts to the test whether the Court meant by that second comment to swallow up the first, to allow in practice the evisceration of freedom of press that it has said would result if there were not "some protection for seeking out the news." 408 U.S. at 681; 417 U.S. at 833. The petitioner Sheriff believes that the Court meant just that. He says that, because he allows the general public no access at all to the Alameda County jail (as he did before this suit was brought) or limits access to periodic conducted tours (as he now does), he can either bar reporters altogether or remit them to signing up for the conducted tours. If the Sheriff is right – if that is what the Court meant when it said that newsmen have no constitutional right of access beyond that afforded the general public – then it is hard to know what First Amendment protections against official barriers to the gathering

of news there are. The antiseptic, periodic public tour has almost nothing to do with news gathering. The Santa Rita tour does not allow photographers or television cameramen to record their impressions for the public.[1] For reporters who convey their impressions in words, the tour is irrelevant to the coverage of spot news stories involving jails and their inmates, which was the genesis of this lawsuit; it has very little more to do with serious journalistic inquiry into the physical and moral conditions of jails. The tours do not extend to all parts of the jail and reporters are not permitted to engage in any conversation with the prisoners.

The four judges who have heard this case on the merits are agreed that to sustain the Sheriff's position would disserve the public dependent on the press to the point of a constitutional violation, by depriving it of news about the Santa Rita jail. They therefore ruled that, subject to the Sheriff's power to exclude reporters when their presence would be dangerous, the Sheriff should be ordered to allow press access to the jail "at all reasonable times and hours" for the purpose of covering jail news. This Court should affirm their judgment.

I. PRISONS AND JAILS ARE MAJOR PUBLIC INSTITUTIONS IN WHICH CITIZENS HAVE A LEGITIMATE INTEREST

In the 1974 prison interview cases this Court declared that "the conditions in this Nation's prisons are a matter

[1] This discriminatory aspect of the tour policy without more condemns it as a denial to the electronic media of the equal protection of the laws. (Pp. 16-18, *infra.*)

that is both newsworthy and of great public importance." *Pell v. Procunier,* 417 U.S. 817, 830 n.7 (1974). It noted an observation of the Chief Justice.

> "We cannot 'continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence . . . . It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem.'" *Id., quoting* Burger, *Our Options Are Limited,* 18 Vill. L. Rev. 165, 167 (1972).

The Court considers here not a prison but a county jail, one among 4,000 jails housing 150,000 persons convicted of minor offenses or awaiting trial.[2] This particular jail, Santa Rita Jail, contains one section called Greystone where conditions quite recently were termed by a district court "truly deplorable" and "shocking and debasing" and were held by the court to constitute cruel and unusual punishment. *Brenneman v. Madigan,* 343 F. Supp. 128, 133 (N.D. Cal. 1972). Significantly, the judge in that case found it necessary in making his judgment to visit Santa Rita because "the content of . . . the reality of confinement is so elusive . . . ." *Id.* at 132. Public understanding of what goes on, of "the reality of confinement," in the Alameda County jail and other local jails is obviously of as great importance as public understanding of what happens in state and federal prisons.

[2] Census Bureau, *Statistical Abstract of the United States, 1976,* pp. 171, 174.

II. THE PRESS PLAYS AN IMPORTANT, CONSTITUTIONALLY ASSIGNED ROLE IN FURTHERING PUBLIC KNOWLEDGE AND UNDERSTANDING OF PRISONS AND JAILS

It is the nature of prisons and jails that there are restrictions on who can enter, inspect or visit. See *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974). In such circumstances the role of the press as the proxy of the public is of the greatest significance.

The press' ability to play this role is what leads to the conferral on it of what Mr. Justice Stewart has pointed out is unique, constitutional protection as an institution. Stewart, *"Or of the Press"*, 26 Hastings L.J. 631 (1975). "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The constitutional guarantees of freedom of the press "are not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations . . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975).

Those are the lofty words of this Court explaining why the press' role in our society entitles it to unique constitutional protection. In the immediate context of the problem of this case, substantially the same point has been

made in practical terms by an experienced prison administrator, Mr. James W. L. Park. After criticizing a provision of a proposed Model Act for the Protection of Prisoners that, in his words, "opens the prison doors to anyone who happens to wander by and demand entrance," Mr. Park says:

> "A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the president of the local Ladies Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs. The media does a good job of reporting in most instances, and prison administrators should have no qualms about admitting responsible reporters to view prison activities and to interview men in these programs." Park, *On Being Medium Nice to Prisoners*, 1973 Wash. U.L.Q. 607, 615.

Within constraints, only some of which are a necessary function of the nature of prisons, newspapers, radio and television stations and periodicals seek to fulfill their constitutional function by keeping the public informed of happenings in prisons and jails. They do so at a time when the most fundamental questions are being raised about our correctional and detention institutions.[3] Perhaps the best examples of coverage of the long-term news about prisons are the quarterly issues of *Corrections Magazine*, published by the Correctional Information Service, Inc.,

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[3] See Serrill, *Critics of Corrections Speak Out*, Corrections Magazine, March 1976, p. 3.

which is affiliated with the American Bar Association's Commission on Correctional Facilities and Services. In its issues of March 1976 and March 1977 the magazine has reported record prison populations (as of January 1, 1976 and 1977, respectively) and has documented the resulting overcrowding by on-the-spot verbal and picture reporting.[4] The general-interest press has also published and broadcast in recent numerous accounts of jail and prison happenings and life.

Press coverage of correctional and detention institutions, though still sadly wanting, has improved to the extent that it has in large part because more prison and jail administrators share Mr. Park's philosophy than Sheriff Houchins'. The Santa Rita situation is aberrational. Other jails in California and elsewhere in the nation are far more open to the press. The sheriffs of the counties that neighbor Alameda County display no such reluctance as Sheriff Houchins to respond warmly to the California Department of Corrections guidelines for local detention facilities, which say that "the various news media should be provided with accurate and timely information so that the public can be adequately informed at all times." (Resp. Br. 12; A. 9-10, 14-15.)

The California and federal prison systems have policies of openness to the press. (Pet. App. 4-20.) The National Advisory Commission on Criminal Justice Standards and Goals, appointed by the Law Enforcement Assistance Administration, from which Alameda County has received

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[4] Gettinger, *U.S. Prison Population Hits All-Time High*, Corrections Magazine, March 1976, p. 9; Wilson, *U.S. Prison Population Sets Another Record, id.*, March 1977, p. 3.

a grant for the reconstruction of its jail, states as one of its standards that "[r]epresentatives of the media should be allowed access to all correctional facilities for reporting items of public interest consistent with the preservation of offenders' privacy." (Resp. Br. 14.)

The point here is not that Sheriff Houchins' conduct is illegal because it does not conform with federal and state guidelines – though it does not – or that he may not deny to the citizens of Alameda the fruits of press access to the county jail that the citizens of other California counties enjoy – though the case to be made for the proposition that the Alameda County citizens are denied the equal protection of the laws is a substantial one.[5]

The point is that the pervasiveness of policies contrary to those of Sheriff Houchins and the absence of the slightest suggestion that these contrary policies have had untoward consequences place on the Sheriff a particularly heavy burden of justifying his restrictive policies. He has not carried that burden. He has offered scant justification other than his reading of this Court's 1974 prison interview cases. As we shall next show, that is not enough.

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[5] The mere existence of a county line cannot justify denying to those Californians who live and vote in Alameda County important political rights that other California citizens enjoy. Reynolds v. Sims, 377 U.S. 533 (1964). The right to be informed about local public affairs – such as jail conditions – is an important political right, a right indeed that alone makes possible the intelligent exercise of the right to vote involved in *Reynolds v. Sims*.

III. "REASONABLE ACCESS" FOR THE PRESS TO A COUNTY JAIL IS A MINIMAL FIRST AMENDMENT REQUIREMENT, AND AN ORDER SECURING IT IS CONSISTENT WITH *PELL* AND *SAXBE*

The right of access of the press, although related to the general public's right to information, ought not to be literally limited to the general public's right of physical access to a public facility. As a practical matter not all members of the public can have access to a jail. But the public is entitled to be informed of, for example, a jail suicide and the conditions that gave rise to it. It is for this reason that reporters are constitutionally entitled to access to the jail to report on the particular incident and its background. We submit that *Pell* and *Saxbe* are not to the contrary.

In *Pell,* the Court opened its discussion of the press' constitutional claims with the remark that the California prison regulation in issue, dealing with interviews with designated inmates, was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigating and reporting of those conditions." 417 U.S. at 830. And it noted in both *Pell* and *Saxbe* that, as was said in *Pell,* "both the press and the general public are accorded full opportunities to observe prison conditions." 417 U.S. at 830, 846-48. Without pausing to inquire whether Sheriff Houchins is attempting to conceal conditions or frustrate the press, the factual context of this case is altogether different. Before this suit was filed, the Santa Rita Jail was completely closed to the press and public. Attempts by reporters to cover stories at Santa Rita were rebuffed both by the previous sheriff and by Sheriff Houchins. These restrictions were imposed although the Sheriff was unaware of any disturbances ever caused by news media access to a jail and

had never even heard of any disruption in any jail or prison, anywhere, because of such access.

Only after this suit was filed did the Sheriff initiate a series of conducted tours for the public. The tours, as we have said, are no substitute for the opportunity to report first-hand on jail events and conditions – and certainly not for those who report by pictures instead of words – and in any event a reporter who did not sign up for a tour weeks or months in advance was completely barred from access to Santa Rita for the balance of 1975, the year in which the tours were first held. In striking contrast is the situation in the California prisons that the Court described in *Pell:*

> "[T]he record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions . . . . [N]ewsmen are permitted to visit both the maximum security and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants." 417 U.S. at 830.

The media plaintiffs in *Pell* and *Saxbe* asked for more. They wanted to be able to interview inmates of their designation. The Court sustained prison rules prohibiting this practice, finding that the prison administrators were justified in their apprehension that the elevation of inmates chosen as the interviewees to the status of "big wheels" would pose a security problem.

In this case, the plaintiff KQED asks only for such access as will enable it minimally to do its job of reporting on jail incidents and conditions. It seeks the ability to gather and convey information to which the public is entitled but that cannot be acquired by members of the public on their own because of the practicalities of jail administration and the limits of and demands upon even the most interested citizen's time. Unless KQED and its sister radio and television stations and newspapers and magazines have that access, then the government represented by Sheriff Houchins will be able to conceal conditions in the jail and "frustrate the press' investigation and reporting of those conditions . . . ." And the ultimate losers will be not only the inmates whose story will remain untold, but also the press and the public.

If the government were made to provide time and a place for an interview with a particular inmate, as it was asked to do in *Pell* and *Saxbe*, the government would be making specific information available. The Court held in *Pell* and *Saxbe* that the government had no obligation thus to provide information. However, by preventing any sort of meaningful access to the jail, the Sheriff in this case is not only refusing to provide information to the press but is actually preventing the press from seeking information to which the public is entitled. The Sheriff does not deny that the Alameda County residents who elected him are

entitled to know about incidents and conditions in Santa Rita. The ground for his policy rather is that he cannot admit the public as a whole to inquire about such incidents and conditions and therefore he need not admit the proxy press. That is a mistaken ground. This Court has never upheld governmental interference with press access to governmental facilities or information solely on the basis that public access is administratively inconvenient. Mere inconvenience or the impracticability of allowing scores or hundreds of individuals to have access to facilities or information cannot justify excluding the press as proxy for them.

It is a different matter where there is some good reason for barring the public from acquiring information either on its own or through its proxy the press. The "big wheel" phenomenon was thought to be such a reason in *Pell* and *Saxbe*, though the aftermath of those cases should caution the Court to be skeptical of the claims of jail or prison administrators as to what the administration of their institutions demands. In both the federal prison system and in the California system, the interviews with designated inmates that were forbidden in those cases are now allowed.[6] In any event, where the content of the information (or the nature of its source) does not demand secrecy but there are administrative reasons for denying access to the public as a whole, then the press should have access. "The journalist can disseminate information with minimal disruption to those controlling it." Comment, *The Right of the Press to Gather Information*

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[6] Federal Bureau of Prisons, Policy Statement No. 1220.1C (1977); California Department of Corrections, Administrative Manual §§ 415.01 - 415.42 (1975).

After Branzburg and Pell, 124 U. Pa. L. Rev. 166, 182 (1975). In short, while the government need not put information that the press desires on a silver platter, neither can the government prevent the press from searching for information to which the public is entitled, merely because administrative reasons make it impracticable for individual members of the public to gain access to that information.

IV. EQUAL ACCESS FOR EACH OF THE VARIOUS MEDIA OF COMMUNICATIONS IS REQUIRED BY THE EQUAL PROTECTION CLAUSE

By forbidding cameras and tape recorders on his periodic tours, the petitioner Sheriff discriminates against radio and television stations. Cameras and tape recorders are the essential and recognized tools of radio and television news-gathering. That discriminatory aspect of the Sheriff's policy is alone enough to condemn it as a denial to radio and television of the equal protection of the laws. The District Court's preliminary injunction affirmed by the Court of Appeals properly encompassed the respondent KQED (operator of both a radio and a television station) and all "responsible representatives of the news media" of all types. It ordered the Sheriff not to exclude "KQED and responsible representatives of the news media" from Santa Rita as a matter of general policy and not to prevent them "from providing full and accurate coverage of the conditions prevailing therein." (Pet. App. 27.) The order is no less broad than the First Amendment and the equal protection clause require. The guarantees of the First Amendment apply equally to – among others – pamphleteers, *Cantwell v. Connecticut,* 310 U.S. 296 (1940); newspapers, *Miami Herald Publishing Co. v. Tornillo,* 418

U.S. 241 (1974); and radio and television, *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee,* 412 U.S. 94 (1973).

Radio and television, as a part of the press, perform their First Amendment functions in an important and unique way. Television in particular brings matters home to the public as probably no other medium of communication can. The jail system, to a large extent hidden from public scrutiny, can be portrayed on television in more forceful terms than it can be on the printed page. Consequently, television coverage of perhaps shocking events and conditions may create a greater impact on the public. The educational benefits afforded by the electronic media also enable audiences without adequate reading skills to receive information about their jails and to form opinions thereon.

Sheriff Houchins has offered no sufficient justification for banning cameras and tape recorders. There is no suggestion in the record that cameras and tape recorders would pose any threat, much less a clear and present danger, to security at Santa Rita. In the circumstances there cannot be a compelling State interest in prohibiting them; only such an interest could possibly justify a discriminatory denial of a fundamental First Amendment freedom. To be sure, this Court held in *Estes v. Texas,* 381 U.S. 532 (1965), that allowing television cameras in a courtroom deprived a defendant of a fair trial. However, the issue here is altogether different, and a courtroom is not a jail. Furthermore, the technological advances that have resulted in making possible far less intrusive television camera coverage than was possible in 1965 cast doubt on the vitality of the *Estes* decision.

Fulfillment of the First Amendment role of the press in gathering and reporting news often depends upon the different perspectives afforded by different media. There is no room for the arbitrary restrictions on the electronic media that Sheriff Houchins has imposed. A jail that is open to some reporters (however inadequate the opening) must be open to all in the absence of a compelling justification. Compare *Westinghouse Broadcasting Co. v. Dukakis*, 409 F. Supp. 895 (D. Mass. 1976). As the court said in *Lewis v. Baxley*, 368 F. Supp. 768, 779 (M.D. Ala. 1973):

> "In this case, the state is asserting the right to exclude certain members of the press from public sessions of the legislature, and from press conferences and press rooms from which other members of the press are not excluded. In this instance, the state must assert a compelling governmental interest and a substantial nexus between that interest and the action taken in furtherance thereof."

No such interest or nexus has been asserted here as would justify the Sheriff's disparate treatment of the print press and the electronic press.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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